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Supreme Court, U.S.
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In The

Supreme Court of the United States

DELIA RUIZ-RIVERA,

Petitioner,

v.

PFIZER PHARMACEUTICAL LLC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This petition presents two questions on which the courts of appeals are in conflict:

1. Whether an employer's recognition of medical restrictions imposed by an employee's personal physician must be disregarded, as a matter of law, in determining whether the employer "regarded" the employee as having a substantially limiting impairment for purposes of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101(2)(C).

2. Whether allegations that an employer "regarded" the plaintiff as having a substantially limiting impairment for purposes of the ADA are subject to a heightened pleading standard.

PARTIES TO THE PROCEEDING

Petitioner Delia Ruiz-Rivera and Respondent Pfizer Pharmaceuticals, LLC., were the only parties to the proceeding below.

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PETITION FOR A WRIT OF CERTIORARI

Delia Ruiz-Rivera respectfully petitions for a writ of certiorari to the United States Court of Appeals for the First Circuit in the above-entitled case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, at 1-25) is reported at 521 F.3d 76. The opinion of the district court denying defendants' motion for summary judgment (App., *infra*, at 26-53) is reported at 463 F. Supp.2d 163. The district court's order granting reconsideration and issuing final judgment against the plaintiffs (App., *infra*, at 54-55) is unreported.

JURISDICTION

The court of appeals entered its judgment on March 27, 2008. App., *infra*, at 1. This petition is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 42 U.S.C. § 12102(2) provides:

§ 12102. Definitions

As used in this chapter:

* * *

(2) Disability

The term "disability" means, with respect to an individual –

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

Title 42 U.S.C. § 12112(a) provides:

§ 12112. Discrimination

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

STATEMENT OF THE CASE

This case involves Petitioner Delia Ruiz-Rivera's claim that Respondent Pfizer Pharmaceuticals terminated her on the basis of disability in violation of the Americans with Disabilities Act. See 42 U.S.C. § 12112(a) (prohibiting disability-based employment discrimination). Because the case arises from the grant of summary judgment to Pfizer, the record must be considered in the light most favorable to Ms. Ruiz. See *Scott v. Harris*, 127 S. Ct. 1769, 1774-1775 (2007).

1. Ms. Ruiz began working for Pfizer as a packing operator in 1997. App., *infra*, at 27. In the last half of 1999, while she was pregnant with her second child, she developed a herniated disc and began to experience numbness in her extremities; the company granted her disability leave for those conditions. *Id.* at 28-29. Ms. Ruiz went on maternity leave after she gave birth on December 31, 1999, and she was scheduled to return to work on February 25. *Id.* at 29. But her rehabilitation physician, Dr. Oscar Ramos, submitted a certificate that stated that Ms. Ruiz had been diagnosed with carpal tunnel syndrome and a herniated disc. *Id.* Dr. Ramos stated that Ms. Ruiz could return to work only if she adhered to certain restrictions on her activities. *Id.* Based on Dr. Ramos's report and the report of another doctor who diagnosed Ms. Ruiz with depression secondary to her physical conditions, the company sent her home for another month. *Id.*

At a return-to-work examination on March 27, Ms. Ruiz insisted to the company doctor, a Dr. Félix, that Pfizer "implement[ ] the restrictions specified by" her physician. *Id.* at 30. But the company doctor responded "that there was no opportunity for her to remain working at the plant with these limitations." *Id.* He sent Ms. Ruiz home pending a further report from her doctor. *Id.* Three days later, Ms. Ruiz returned with Dr. Ramos's additional report. *Id.* In that report, Dr. Ramos stated that he had diagnosed Ms. Ruiz with carpal tunnel syndrome, tendonitis, and herniated discs, and that "[s]he should have some restrictions at her work area so she can do her job with minimal deterioration of her condition." *Id.* at 30-31. Those restrictions included avoiding repetitive motions and the "hands-over-the-shoulders position," not lifting more than 25 pounds at a time, and limiting "lifting-carrying-pushing-pulling-holding-bending." *Id.*

Reviewing those restrictions with Ms. Ruiz's supervisor, the company doctor concluded that Ms. Ruiz could no longer do her job and should not return to work. *Id.* at 31. And Frances Guzman, who worked as the company's Assistant Personnel Manager, "advised plaintiff that with the conditions imposed by her physicians she had no chance of working either at Pfizer or at any other pharmaceutical company in the industry." *Id.* Ms. Ruiz refused to return to work unless the company heeded the restrictions her physician had imposed, and the company terminated her. *Id.* at 31-32.

2. Ms. Ruiz filed this lawsuit in the United States District Court for the District of Puerto Rico on June 5, 2001. C.A. Dkt. #1. As relevant here, Ms. Ruiz claimed that the company had discriminated against her on the basis of an actual or perceived disability in violation of the ADA. C.A.J.A. 7-8 (Amd. Cplt. ¶¶ 41-51). Among other things, the complaint specifically alleged that "Pfizer terminated plaintiff because of her *perceived* disability." *Id.* at 7 (Amd. Cplt. ¶ 45) (emphasis added). The complaint included a number of allegations that touched on the company's knowledge of and perceptions about the extent of Ms. Ruiz's impairments. See *id.* at 4 (Amd. Cplt. ¶ 23) (Ms. Ruiz's obstetrician "informed her that someone from Pfizer had called making inquiries as to her leg[] conditions"); *id.* at 5 (Amd. Cplt. ¶ 26) (the company required Ms. Ruiz "to report on a weekly basis for medical evaluation with the company's physician"); *id.* at 6 (Amd. Cplt. ¶ 33) (company doctor "confirm[ed] the work restrictions that Ms. Ruiz-Rivera had" and then "told her that with those restrictions she could not stay there because there was no position available to her").

On January 31, 2003, Pfizer filed a motion for summary judgment. C.A.J.A. 20-56. The company argued that Ms. Ruiz did not have a "disability" as defined in the ADA and therefore could not invoke the protection of the statute. *Id.* at 28-30. The district court granted that motion in part and denied it in part. App., *infra*, at 52. In particular, the court concluded that Ms. Ruiz's impairments did not actually

substantially limit any of her major life activities, *id.* at 47-48, but that Ms. Ruiz had created a triable issue as to whether the company "regarded" her impairment as so limiting, *id.* at 48-51. See 42 U.S.C. § 12102(2) (defining "disability" as "a physical or mental impairment that substantially limits one or more of the major life activities," a "record of such an impairment," or "being regarded as having such an impairment").

The court concluded that "[a]ccording to the evidence presented, Pfizer mistakenly believed that plaintiff's impairment substantially limited her ability to work in the entire pharmaceutical industry." App., *infra*, at 50. The court pointed to the company doctor's statement that "with these limitations [plaintiff] cannot stay in the plant" as well as the company Assistant Personnel Manager's statement that Ms. Ruiz's restrictions prevented her from "working either at Pfizer or at any other pharmaceutical company." *Id.* at 50-51. Accordingly, the district court permitted Ms. Ruiz's ADA claim to proceed on the basis that the company perceived her impairment as substantially limiting. *Id.* at 51.

Pfizer filed a motion for reconsideration. C.A.J.A. 376-386. The company argued, for the fist time in this litigation, that an employer's response to the recommendations of an employee's treating physician cannot establish a perceived disability. *Id.* at 383. In a one-page order without any explanation, the district court granted the motion to reconsider on January 8,

2007, and entered final judgment for the company. App., *infra*, at 54-55.

3. The First Circuit affirmed, App., *infra*, at 25. In an opinion by Judge Smith (sitting by designation from the District of Rhode Island), joined by Judges Lipez and Howard, the court offered two reasons for affirming the grant of summary judgment.

First, the court concluded that "regarded as claims under the ADA require an even greater level of specificity [in pleading] than other claims." *Id.* at 16. "In order to allege an actionable regarded as claim," the court continued, "a plaintiff must select and identify the major life activity that she will attempt to prove the employer regarded as being substantially limited by her impairment." *Id.* Applying those principles, the court found Ms. Ruiz's complaint to have been deficient because the complaint did not allege specific facts "to explain any false perception on Pfizer's part" or to identify "any non-limiting impairment which Pfizer mistakenly believed to be substantially limiting." *Id.* at 15-16. The complaint's allegation that the company "terminated plaintiff because of her *perceived* disability," C.A.J.A. 7 (Amd. Cplt. ¶ 45) (emphasis added), and the factual allegations describing Pfizer's knowledge of and response to Ms. Ruiz's impairments, *id.* at 4-6 (Amd. Cplt. ¶¶ 23, 26, 36), were apparently insufficient. See App., *infra*, at 17 ("It simply will not do for a plaintiff to fail to plead with adequate specificity facts to support a regarded as claim, all-the-while hoping to play that card if her initial hand is a dud.").

Second, and turning to the summary judgment record, the court concluded that all of the evidence supporting the perceived-disability allegations involved the company's implementation of the recommendations of Ms. Ruiz's own doctors. *Id.* at 18-22. But the court held, as a matter of law, that a plaintiff "may not rely exclusively on her employer's recognition or implementation of the restrictions imposed by her own physician to establish a regarded as claim." *Id.* at 20. Applying that rule, the court held that neither the statements of the company doctor nor the statements of the company's Assistant Personnel Manager could support Ms. Ruiz's claim, because those statements were "based entirely on Ruiz Rivera's own doctor's recommendations." *Id.* at 21.

REASONS FOR GRANTING THE WRIT

The First Circuit's decision in this case exacerbated one conflict in the circuits and created another. And it did so by imposing limitations on ADA perceived-disability claims that appear nowhere in the statutory text (or, for that matter, the legislative history). That result is especially troubling, because the "regarded as" prong of the ADA's disability definition is "particularly important for individuals with stigmatic conditions." S. Rep. No. 101-116 at 24 (1989). See also *Vande Zande v. Wisconsin Dept. of Admin.*, 44 F.3d 538, 541 (7th Cir. 1995) (explaining that the ADA's coverage of people with perceived disabilities, "although at first glance peculiar, actually makes a better fit

with the elaborate preamble to the Act, in which people who have physical or mental impairments are compared to victims of racial and other invidious discrimination").

There is a longstanding conflict in the circuits regarding whether a plaintiff may rely on her employer's recognition of the restrictions imposed by her doctor to show that the employer "regarded" her as having a substantially limiting impairment under 42 U.S.C. § 12102(2)(C). In its decision here, the First Circuit joined the Sixth, Eighth, and Tenth Circuits in holding that, as a matter of law, the employer's recognition of such restrictions may not establish a perceived disability. But the Third and Ninth Circuits have ruled directly to the contrary. Because the reports of and restrictions imposed by an employee's personal physician will often be crucial in informing the perceptions of the employer, and because the statutory text draws absolutely no distinction among the various sources of information on which an employer's perception of an employee's impairment may be based, the First Circuit's holding calls out for this Court's review.

Moreover, by holding that plaintiffs must plead ADA "regarded as" claims with unusual specificity, the First Circuit created a conflict with decisions of the Sixth, Seventh, and Ninth Circuits – all of which have held that courts have no power to impose a heightened pleading standard on ADA plaintiffs. On this issue, as well, the First Circuit's holding has absolutely no basis in the statute, and it is flatly

inconsistent with this Court's cases. This Court's review is necessary to resolve the conflict the First Circuit created and to clarify that ADA claims are not subject to a heightened pleading standard.

A. By Holding, as a Matter of Law, that an Employer's Recognition of Limitations Imposed by an Employee's Doctor Must Be Disregarded in a "Regarded As" Case, the Court of Appeals Exacerbated a Circuit Conflict and Contravened the Plain Text of the ADA

1. It is undisputed that Pfizer's company doctor determined that Ms. Ruiz's impairments barred her from returning to her position at the bottling plaint. See p. 4, *supra*. And Ms. Ruiz testified that the company's Assistant Personnel Manager "told her that because of the conditions imposed by her physicians, there was no opportunity for her to work at Pfizer or at any other pharmaceutical company." App., *infra*, at 6. Under the standards this Court set forth in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), that evidence should suffice to create a genuine issue of material fact on the question whether the company regarded Ms. Ruiz's impairments as substantially limiting the major life activity of working. See *id.* at 491-493 (individual is regarded as substantially limited in working if employer perceives her impairment as disqualifying her from "a broad class of jobs").

But the court of appeals affirmed the grant of summary judgment to the company while explicitly

refusing to consider either the company doctor's determinations or the Assistant Personnel Manager's statements. The court did so because it held, as a matter of law, that an employee "may not rely exclusively on her employer's recognition or implementation of the restrictions imposed by her own physician to establish a regarded as claim." App., *infra*, at 20. See also *id.* at 21 ("Any reliance on Dr. Felix's statements or opinion, based entirely on Ruiz Rivera's own doctor's recommendations, cannot support a regarded as claim."). In so holding, the First Circuit relied on the Eighth Circuit's decision in *Breitkreutz v. Cambrex Charles City, Inc.*, 450 F.3d 780 (8th Cir. 2006), and the Tenth Circuit's decision in *Lusk v. Ryder Integrated Logistics*, 238 F.3d 1237 (10th Cir. 2001).

In *Breitkreutz*, 450 F.3d at 783, the Eighth Circuit held that the plaintiff had not presented sufficient evidence to overcome summary judgment on the "regarded as" question, because his employer merely implemented the restrictions imposed by the plaintiff's own physician: "If a restriction is based upon the recommendations of physicians, then it is not based upon myths or stereotypes about the disabled and does not establish a perception of disability." In *Lusk*, 238 F.3d 1242, the Tenth Circuit similarly held that the plaintiff could not overcome summary judgment on the "regarded as" question, because "Defendant's perception of Plaintiff was not based on speculation, stereotype or myth, but on the doctor's written evaluations of Plaintiff's condition." See also *id.* at 1241 ("Where the recognition of Plaintiff's

limitations is not an erroneous perception, but is instead a recognition of fact, a finding that Plaintiff was regarded as disabled is inappropriate."). Although the First Circuit did not cite the case, the Sixth Circuit adopted the same rule in *Gruener v. Ohio Casualty Insurance Co.*, 510 F.3d 661, 665 (6th Cir. 2008) (because defendant's "understanding of [plaintiff's] impairments and how they limited her simply tracked the specific and valid restrictions prescribed by her own doctor," the plaintiff's "evidence failed to warrant a regarded-as-disabled instruction").

But the holdings of the Sixth, Eighth, and Tenth Circuits, along with that of the First Circuit here, conflict with holdings of the Third and Ninth Circuits on the same question. Judge Becker's opinion for the Third Circuit in *Taylor v. Pathmark Stores, Inc.*, 177 F.3d 180 (3d Cir. 1999), is particularly close to this case. There, as here, the defendant employer concluded that the restrictions imposed by the plaintiff's physician would disqualify the plaintiff from performing a wide range of positions. Holding that the plaintiff had presented sufficient evidence that his employer regarded him as disabled, the court observed that "the statement in Pathmark's May 1996 letter that he was unable to perform *any* Pathmark job, even with accommodation, suggests a perception of limits that would likely constitute substantial limitation in many major life activities" – including the major life activity of working. *Id.* at 188. The court specifically rejected the argument that, because

the defendant relied on the report of the plaintiff's own doctor, it could not be held to have regarded the plaintiff as having a disability. See *id.* at 190-191. In *Holihan v. Lucky Stores, Inc.*, 87 F.3d 362, 366 (9th Cir. 1996), cert. denied, 520 U.S. 1162 (1997), the Ninth Circuit reversed a grant of summary judgment and held that the plaintiff employee had submitted sufficient evidence from which a jury could conclude that his employer regarded him "as suffering from a disabling mental condition that substantially limited his ability to work." In support of that ruling, the court noted that the employer had "received several doctors' reports diagnosing Holihan with depression, including the reports of Drs. Strickler and Cramer" – two of the plaintiff's treating professionals. *Id.*[1]

These decisions squarely conflict with the court of appeals' holding here. This Court's intervention is necessary to resolve the conflict.

2. The court of appeals did not just exacerbate a conflict in the circuits. It also contravened the plain text of the ADA. The statute provides no support for the First Circuit's rule that an "employer's recognition or implementation of the restrictions imposed by [the plaintiff's] own physician" must be ignored in determining whether an employer regarded an

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[1] See also *Riemer v. Illinois Dept. of Transportation*, 148 F.3d 800, 807 (7th Cir. 1998) (sufficient evidence that employer regarded employee as disabled where, based on an examining doctor's recommendation, supervisor concluded that employee could not safely work around dust and fumes).

employee as having a disability. The statute defines "disability" as "having a physical or mental impairment that substantially limits one or more of the major life activities," "a record of such an impairment," or "being regarded as having such an impairment." 42 U.S.C. § 12102(2). When an employer perceives an individual as having an impairment that substantially limits major life activities, the "regarded as" language is, by its plain terms, satisfied – regardless of the facts on which the employer's perception is based. Nothing in the statute excludes cases in which the employer relies on a report of the plaintiff's physician from the "regarded as" provision, and the court of appeals therefore had no power to read such an exception into the statute. See *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 211-212 (1998) (refusing to read unexpressed exceptions into the ADA's plain text).

Absent a basis in the text, a court has no power to erect *per se* rules barring particular classes of evidence from, or requiring particular classes of evidence in, a statutory cause of action. This Court made that point clear in *Desert Palace v. Costa*, 539 U.S. 90 (2003). *Desert Palace* held that courts could not require plaintiffs to provide direct evidence of discrimination to obtain a "mixed-motive" instruction under 42 U.S.C. § 2000e-2(m), a provision of the Civil Rights Act of 1991. The Court explained that "Section 2000e-2(m) unambiguously states that a plaintiff need only 'demonstrat[e]' that an employer used a

forbidden consideration with respect to 'any employment practice,'" and that "[o]n its face, the statute does not mention, much less require, that a plaintiff make a heightened showing through direct evidence." *Id.* at 98-99 (quoting 42 U.S.C. § 2000e-2(m)). And the Court held that "where, as here, the words of the statute are unambiguous, the judicial inquiry is complete." *Id.* at 98 (internal quotation marks omitted).[2] The same analysis applies here. The ADA's "regarded as" language, on its face, applies to *any* case in which the plaintiff is "regarded as having such an impairment," 42 U.S.C. § 12102(2)(C), without mentioning – much less excluding – cases in which the employer's perception is based on a report of the plaintiff's physician. The court of appeals erred by going beyond the words of the statute.

The First Circuit offered absolutely no justification for its rule that a plaintiff "may not rely exclusively on her employer's recognition or implementation of the restrictions imposed by her own physician to establish a regarded as claim." App., *infra*, at 20. And the cases on which the court relied offered only the slimmest of justifications at best. In *Lusk*, for example, the Tenth Circuit suggested that an employer's perception of an

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[2] See also *Sprint/United Management Co. v. Mendelsohn*, 128 S. Ct. 1140, 1147 (2008) (explaining that it would be an abuse of discretion for a district court to "appl[y] a *per se* rule excluding" evidence of alleged acts of discrimination by defendant's supervisors who played no part in the alleged discrimination against plaintiff).

employee's disability can satisfy the "regarded as" language only in cases where that perception is "based on speculation, stereotype, or myth." *Lusk*, 238 F.3d at 1242. A perception that rests "on the doctor's written evaluations of Plaintiff's condition," the court seemed to conclude, cannot meet that requirement. *Id.* The Eighth Circuit in *Breitkreutz* was more explicit on the point. That court asserted that the "provision addressing perceived disabilities is intended to combat the effects of archaic attitudes, erroneous perceptions, and myths that work to the disadvantage of persons with or regarded as having disabilities," and it concluded that "[i]f a restriction is based upon the recommendations of physicians, then it is not based upon myths or stereotypes about the disabled." *Breitkreutz*, 450 F.3d at 784 (internal quotation marks omitted).

These courts may well be correct that the *goal* of the "regarded as" provision is to "combat the effects of archaic attitudes, erroneous perceptions, and myths." *Id.* See also *Sutton*, 527 U.S. at 489 (stating that, where individuals are covered by the "regarded as" prong "it is necessary that a covered entity entertain misperceptions about the individual – it must believe either that one has a substantially limiting impairment that one does not have or that one has a substantially limiting impairment when, in fact, the impairment is not so limiting," and that these "misperceptions often 'resul[t] from stereotypic assumptions not truly indicative of . . . individual ability.'") (quoting 42 U.S.C. § 12101(7)). But nothing in the

statute requires a plaintiff to *prove* that the employer misperceived the limitations imposed by her condition *to establish coverage under the "regarded as" prong*. All a plaintiff must show to establish coverage under that prong is that the employer "regarded" her as having a substantially limiting impairment. 42 U.S.C. § 12102(2)(C). Nothing in the "regarded as" provision turns on whether the employer's perception of the plaintiff's impairment was correct.[3] Rather, the statute addresses the correctness or incorrectness of the employer's perception in a separate provision that requires the plaintiff to show that she was a "qualified individual with a disability," *id.* § 12112(a) – that is, that "with or without reasonable accommodation," she "can perform the essential functions of the employment position," *id.* § 12111(8).

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[3] In *Sutton*, the Court turned to the "regarded as" prong only after it held that the plaintiffs did not *in fact* have impairments that substantially limited major life activities; it is therefore unsurprising that the language of the Court's opinion presumes that an individual seeking coverage under the "regarded as" prong does not actually have a substantially limiting impairment. But nothing in *Sutton* or the statutory language makes the ADA's present- and perceived-disability prongs mutually exclusive, or requires resort to one only if the other is disproved. Indeed, both the legislative history and the EEOC's enforcement guidance are directly to the contrary. See H.R. Rep. No. 101-485, Pt. 3, at 31 (1990) (stating that a "person who is covered because of being regarded as having an impairment is not required to show that the employer's perception is inaccurate"); EEOC Compliance Manual § 902.8(a) ("The legislative history to the Act makes clear that the individual does not have to demonstrate that the employer's perception is wrong.").

The reports of an employee's doctor will often be the key source of information on which an employer relies in developing its perception about an employee's impairment. Although an employer's reaction to those reports will not *always* demonstrate that the employer "regarded" the employee as having a disability, the court of appeals utterly disregarded the statutory text in concluding that the employer's reaction may *never* be considered *as a matter of law*. This Court's intervention is necessary to vindicate the supremacy of the text Congress adopted.

B. By Holding That "Regarded As" Allegations Are Subject to a Heightened Pleading Standard, the Court of Appeals Contravened the Holdings of Other Circuits and of This Court

1. A second aspect of the First Circuit's decision calls out for this Court's review. The court of appeals read this Court's opinion in *Sutton* for the proposition "that regarded as claims under the ADA require an even greater level of specificity [in pleading] than other claims." App., *infra*, at 16. "In order to allege an actionable regarded as claim," the court of appeals held, "a plaintiff must select and identify the major life activity that she will attempt to prove the employer regarded as being substantially limited by her impairment." *Id.* The court did not deny that the complaint contained a number of specific allegations concerning Ms. Ruiz's interactions with Pfizer officials and their response to her diagnoses. See p. 5, *supra*. And the court acknowledged that Ms. Ruiz's

complaint specifically alleged that "'Pfizer terminated plaintiff because of her *perceived* disability.'" *Id.* at 15 (quoting Amd. Cplt. ¶ 45, emphasis in court of appeals' opinion). Although the court recognized that "this paragraph could signal to a defendant that plaintiff is asserting a regarded as claim," it concluded that the complaint did not allege sufficiently specific facts to support such a claim: "with no facts alleged to explain any false perception on Pfizer's part, and no facts alluding to any non-limiting impairment which Pfizer mistakenly believed to be substantially limiting, this allusion falls far short of the mark." *Id.* at 15-16. Because Ms. Ruiz "fail[ed] to plead with adequate specificity" the "facts [that] support[ed]" her allegation that Pfizer regarded her as having a disability, the court of appeals concluded that her complaint should have been dismissed. App., *infra*, at 17.

By adopting a heightened pleading standard for a plaintiff's allegations that she is covered by the ADA, the First Circuit created a conflict with decisions of the Sixth, Seventh, and Ninth Circuits. See *EEOC v. J.H. Routh Packing Co.*, 246 F.3d 850, 854 (6th Cir. 2001) (holding that ordinary notice pleading principles apply to the "disability" question under the ADA); *Mattice v. Memorial Hosp.*, 249 F.3d 682, 685 n.3 (7th Cir. 2001) (rejecting "heightened pleading standard for ADA claims"); *Skaff v. Meridien North America Beverly Hills LLC*, 506 F.3d 832, 841-842 (9th Cir. 2007). Indeed, the Sixth Circuit in *J.H. Routh* expressly rejected the notion, adopted by the

First Circuit here, that the plaintiff's complaint must specifically "identify the major life activity that she will attempt to prove the employer regarded as being substantially limited by her impairment." App., *infra*, at 16. To the contrary, the Sixth Circuit held, "so long as the complaint notifies the defendant of the claimed impairment, the substantially limited major life activity need not be specifically identified in the pleadings." *J.H. Routh Packing*, 246 F.3d at 854. The court reasoned that "[a]n accusation of discrimination on the basis of a particular impairment provides the defendant with sufficient notice to begin its defense against the claim." *Id.* And the Seventh Circuit in *Mattice* expressly rejected the notion, adopted by the First Circuit here, that this Court's decision in *Sutton* adopted a heightened pleading standard. See *Mattice*, 249 F.3d at 685 n.3 ("agree[ing] with the EEOC that *Sutton* did not create a heightened pleading standard"). This Court's intervention is necessary to resolve these conflicts.

The decision of the court of appeals also implicates the significant confusion in the lower courts regarding the scope of this Court's decision in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007). As one leading court of appeals decision has explained, "[t]he issues raised by *Twombly* are not easily resolved, and likely will be a source of controversy for years to come." *Phillips v. County of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008). In particular, the lower courts have expressed uncertainty about the continued vitality of this Court's previously consistent

rejection of heightened pleading requirements outside of the specific contexts in which Fed. R. Civ. P. 9(b) or a federal statute imposes such a requirement. See *Jones v. Bock*, 127 S. Ct. 910, 919-920 (2007); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 515 (2002); *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993).

The First Circuit here appeared to read *Twombly* as dictating a heightened pleading standard. App., *infra* at 16. But the Third, Ninth, and District of Columbia Circuits have specifically refused to read *Twombly* as departing from this Court's consistent rejection of judicially imposed heightened pleading requirements. See *Phillips*, 515 F.3d at 233 (Third Circuit: "The Court emphasized throughout its opinion that it was neither demanding a heightened pleading of specifics nor imposing a probability requirement. Indeed, the Court cited *Twombly* just days later as authority for traditional Rule 8 and 12(b)(6) principles."); *Skaff*, 506 F.3d at 841-842 (Ninth Circuit: citing *Twombly*, among other cases, for the proposition that "the Supreme Court has repeatedly instructed us not to impose such heightened standards in the absence of an explicit requirement in a statute or federal rule"); *Aktieskelsabet AF 21. November 2001 v. Fame Jeans Inc.*, 525 F.3d 8, 2008 WL 1932768 at *5 (D.C. Cir., Apr. 29, 2008) (holding that "[a]fter decades of such consistency, we will not lightly assume the Supreme Court intended to tighten pleading standards" and that *Twombly* "indicated quite clearly that it meant no such thing"). This

Court's intervention is necessary to resolve that disagreement.[4]

2. The First Circuit's imposition of a heightened pleading standard is flatly inconsistent with this Court's cases. To support its holding, the Court of Appeals relied on this Court's rulings in *Sutton*, *supra*, and *Twombly*, *supra*. Neither case supports imposing a heightened pleading standard on complaints alleging that the defendant "regarded" the plaintiff as having a disability under the ADA.

Nothing in *Sutton* even purports to address the proper standard for pleading claims under the ADA. In upholding dismissal of the complaint there, the

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[4] This Court recently granted certiorari to address the application of *Twombly* to suits under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). See *Ashcroft v. Iqbal*, 128 S. Ct. ___ (June 16, 2008). But this Court's decision in that case will not resolve the pleading question presented here. As this Court has recognized, pleading standards in suits against public officials must take account of the qualified immunity defense. See *Crawford-El v. Britton*, 523 U.S. 574, 597-598 (1998) (stating that district courts could "protect[ ] the substance of the qualified immunity defense" in cases against public officials by "insist[ing] that the plaintiff 'put forward specific, nonconclusory factual allegations' that establish improper motive causing cognizable injury in order to survive a prediscovery motion for dismissal or summary judgment") (quoting *Siegert v. Gilley*, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring in the judgment)). But this case raises no qualified immunity issue; it raises the question whether *Twombly* authorizes a heightened pleading standard *outside* of the context of cases against public officials – a question on which the courts of appeals have also divided.

Court did *not* reason that the complaint failed to allege sufficiently *specific* facts or to meet a heightened pleading standard. The Court simply held, accepting the plaintiffs' allegations as true and applying the ordinary analysis under Fed. R. Civ. P. 12(b)(6), that the plaintiffs' complaint failed to state a claim. See *Sutton*, 527 U.S. at 491 ("Considering the allegations of the amended complaint in tandem, petitioners have not stated a claim that respondent regards their impairment as substantially limiting their ability to work.").

Unlike *Sutton*, this Court's decision in *Twombly* plainly does address pleading standards. But contrary to the First Circuit's apparent interpretation, the *Twombly* Court made clear that it did "not require heightened fact pleading of specifics." *Twombly*, 127 S. Ct. at 1974. The Court specifically reaffirmed its earlier decisions in *Leatherman*, *supra*, and *Swierkiewicz*, *supra*, which rejected any heightened pleading standard outside of the contexts specified in Rule 9(b) or federal statutes. See *Twombly*, 127 S. Ct. 1973-1974. And the Court specifically stated that "we do not apply any heightened pleading standard, nor do we seek to broaden the scope of Federal Rule of Civil Procedure 9, which can only be accomplished by the process of amending the Federal Rules, and not by judicial interpretation." *Id.* at 1973 n.14 (internal quotation marks omitted). And two weeks later, in *Erickson v. Pardus*, 127 S. Ct. 2197 (2007) (*per curiam*), the Court summarily reversed a lower court decision that had applied a heightened pleading

standard. The *Erickson* Court cited *Twombly* for the proposition that "[s]pecific facts are not necessary; the statement need only '"give the defendant fair notice of what the . . . claim is and the grounds upon which it rests."'" *Id.* at 2200 (quoting *Twombly*, 127 S. Ct. at 1964, in turn quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). Especially in light of *Erickson*, the First Circuit's holding can find no support in this Court's cases. This Court's intervention is necessary.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 07-1595

DELIA RUIZ RIVERA,

Plaintiff-Appellant,

v.

PFIZER PHARMACEUTICALS, LLC

Defendant-Appellee.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO
[Hon. Raymond L. Acosta, U.S. District Judge]

Before

Lipez and Howard, Circuit Judges.

and Smith,* District Judge.

Wilma Reveron Collazo, with whom Alberto J. Torrado Delgado was on brief, for appellant.

Mariela Rexach, with whom Carl Schuster and Schuster Aguilo LLP were on brief, for appellee.

March 27, 2008

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* Of the District of Rhode Island, sitting by designation.

SMITH, District Judge. This case presents as a so-called "regarded as" disability claim under the Americans with Disabilities Act ("ADA"). However, as the discussion below reveals, once the layers of argument are stripped away, the regarded as claim is revealed to be a chimera. Thus, the District Court's grant of summary judgment, on reconsideration, as to the regarded as claim was appropriate, and the judgment is affirmed.

I. Facts and Background

In late 1997, appellant Delia Ruiz Rivera ("Ruiz Rivera") began working, on a temporary basis, as a packaging operator in appellee Pfizer Pharmaceutical LLC's ("Pfizer") Puerto Rico facility. Nearly one year later, Ruiz Rivera achieved regular employee status when she was assigned to Pfizer's bottling department. Ruiz Rivera's position as a packaging operator in the bottling department involved pouring pills, bottles, and caps, monitoring the conveyor, packing and inspecting the product, and cleaning machinery.

Ruiz Rivera became pregnant several months after becoming a regular employee. As her pregnancy progressed, she submitted several notes from her doctor to Pfizer informing it of certain medical-related limitations, including a recommendation that she avoid walking long distances, that her shifts be limited, and that she work only in a seated position.

In August 1999, Ruiz Rivera informed Pfizer of several medical problems, including edema, numbness, and continued effects of a potentially herniated disc. Based on her doctor's recommendations, Pfizer, through its in-house physician, Dr. Felix, authorized a short leave of absence. Soon after Ruiz Rivera returned from leave, she submitted to Dr. Felix another medical certificate from Dr. Ramos, her physiatrist, asking that she be excused from work from August 30, 1999 through November 1, 1999, citing her herniated disc-related medical problems. Accordingly, Pfizer granted her temporary non-occupational disability leave until November. Come November, Ruiz Rivera sought and was provided another medical leave until January 1, 2000. She gave birth in late December, at which time her eight-week maternity leave commenced.

At the completion of her maternity leave, Ruiz Rivera submitted to Dr. Felix at Pfizer a medical certificate from Dr. Ramos indicating that she was being treated for carpal tunnel syndrome and lumbo sacral disc herniation. Dr. Ramos indicated that Ruiz Rivera was fit to return to work, with specific limitations, recommended that she avoid repetitive hand motions, placing her hands over her shoulders, lifting, pushing, holding, and bending, and placed a twenty-five pound limitation on how much she could lift. At the same time, Ruiz Rivera presented to Dr. Felix a medical certificate from a different doctor diagnosing her with major depression. Based on these two submissions, Pfizer granted an additional month

of leave benefits to Ruiz Rivera. On March 27, 2000, after Ruiz Rivera had been on authorized leave for nearly seven straight months, she returned to work and insisted that Pfizer implement her doctor's earlier recommendations and restrictions. Dr. Felix informed Ruiz Rivera that there were no opportunities available where she could work with such stringent limitations; however, Dr. Felix agreed to confer with Dr. Ramos, and prepared for him a consultation form regarding Ruiz Rivera's condition, treatment options, and rehabilitation opportunities.

After an additional week of leave, Ruiz Rivera reported back to work at Pfizer. At that time, she provided to Dr. Felix a consultation report which provided, in pertinent part:

> *Diagnosis*
> Left Carpal Tunnel Syndrome
> Both Wrists Tendinitis
> L(subscript 5)S(subscript 1)Discs
> Herniation
>
> These are progressive diseases and may deteriorate her condition. She uses wrists splints at night and gets anti-inflammatory and muscle relaxants, and needs to protect the affected areas from damage. . . . She should have some restrictions at her work area, so she can do her job with minimal deterioration of her condition. These restrictions should last at least six months, but may be longer.

– Avoid repetitive motions of hands
– Avoid hands-over-the shoulders position
– Do not lift over 25 lbs.
– Limit lifting – carrying – pushing – pulling – holding – bending.

Based on the information provided and the restrictions imposed by Dr. Ramos, Dr. Felix concluded that, "[i]n view of this [sic] recommendations and after conversation with [plaintiff's] work area supervisor where she can not perform the essential tasks of her job and needs her hands I do not recommend a RTW [return to work] to prevent further aggravation or lesion. Case discussed [with] HR [Human Resources] for plan of action."

Ruiz Rivera later spoke to Frances Guzman, Pfizer's Assistant Personnel Manager, who advised her that Pfizer did not have to accommodate the restrictions imposed by her doctor because, in Guzman's view, Ruiz Rivera was not disabled under the ADA.[1] Guzman testified at her deposition that she explained to Ruiz Rivera that because she wasn't entitled to accommodation, she should pursue medical leave and again seek temporary non-occupational

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[1] At her deposition, Guzman testified as follows:

> [B]ecause there is no permanent disability, and this is exactly how I explained it to her, and it's based on what her physician is saying, I don't have to make an accommodation under the ADA. . . . And then I explained that what her doctor is writing, in fact she cannot perform the duties of a packaging operator . . . but that this is not a qualified condition.

disability insurance. Ruiz Rivera asserts that Guzman also told her that because of the conditions imposed by her physicians, there was no opportunity for her to work at Pfizer or at any other pharmaceutical company. While Pfizer took no action to terminate her at this point, Ruiz Rivera did not return to work after these conversations.

Approximately three months later, in a letter dated June 21, 2000, Pfizer requested that Ruiz Rivera return for a meeting to discuss her health and status. Ruiz Rivera responded by letter shortly thereafter, but did not accept Pfizer's request for a meeting. Approximately six months later, Pfizer again wrote to Ruiz Rivera requesting that she return to work. Ruiz Rivera did not respond. After Ruiz Rivera rebuffed this request, Pfizer officially terminated her employment.[2]

The Amended Complaint (the "Complaint") in this matter alleged numerous violations of federal and Puerto Rico law, including the Americans With Disabilities Act ("ADA"), 42 U.S.C. §§ 12101-12213; the Puerto Rico law counterpart to the ADA, Law No. 44 of July 2, 1985 ("Law 44"); Title VII of the Civil Rights Act, 42 U.S.C. § 2000 *et seq.*; the Pregnancy Discrimination Act; the Puerto Rico Pregnant

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[2] By this point, Ruiz Rivera already had begun to pursue her discrimination claims against Pfizer. She filed a formal administrative complaint before the Puerto Rico Labor Department Anti-Discrimination Unit and the Equal Employment Opportunity Commission in May, 2000.

Mothers Protection Act (Act No. 3 of March 13, 1942); the Puerto Rico Sex Discrimination in Employment Act (Act No. 69 of July 6, 1985); the Puerto Rico Discrimination in Employment Act (Act No. 100 of June 30, 1959); and Puerto Rico's Law 80 of May 30, 1976. Through summary judgment, Pfizer moved for dismissal of the Complaint. Soon after, the parties stipulated to dismissal with prejudice of all but the ADA and Law 44 claims. In support of its motion for summary judgment, Pfizer argued that Ruiz Rivera was not disabled within the meaning of the ADA, that she thus could not establish a prima facie case of disability discrimination, and as a result, she was not entitled to any accommodations. In response, Ruiz Rivera asserted that she was disabled under the ADA insomuch as she was "substantially limited in the major life activity of sitting and standing," and that Pfizer's failure to accommodate her disability violated the ADA. In the alternative, she argued in her summary judgment opposition papers that she was not disabled in the sense that she was not "substantially limited on the major life activity of working" but that Pfizer regarded her as such when it refused to accommodate the restrictions imposed by her doctors. Notably, as we discuss in more detail below, this was the first time that Ruiz Rivera raised the regarded as claim with any degree of specificity.[3]

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[3] The claims we discuss herein – failure to accommodate a disability, termination because of one's disability, and termination of employment based on a perceived disability – are all

(Continued on following page)

The District Court conducted a thorough analysis of Ruiz Rivera's failure to accommodate claim. *See generally Ruiz Rivera v. Pfizer Pharm. LLC,* 463 F. Supp. 2d 163 (D.P.R. 2006). The District Court determined that the record was devoid of evidence showing that Ruiz Rivera was disabled in any major life activity, and, accordingly, found that she was not entitled to accommodation. *See id.* at 172-75. The District Court then went on to assess Ruiz Rivera's purported parallel claim that she was not disabled, but that Pfizer terminated her because it mistakenly regarded her as disabled. Based on statements allegedly made by Dr. Felix and Ms. Guzman, the District Court denied summary judgment, stating that Ruiz Rivera had "proffered sufficient evidence to establish a prima facie case that Pfizer regarded her as having an ADA-covered impairment which prevented her from going back to work and which led to her eventual termination." *Id.* at 176-77.[4]

Pfizer filed a Motion for Reconsideration on December 14, 2006, arguing that Ruiz Rivera's regarded as claim was legally insufficient if based solely on statements made in connection with her request

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cognizable causes of action under the ADA. For simplicity, we will refer collectively to the claims dismissed by the District Court as the failure to accommodate claim and to the remaining claim as the regarded as claim.

[4] The District Court simultaneously granted in part and denied in part Pfizer's motions for summary judgment on Ruiz Rivera's Law 44 claims, as Law 44 mirrors the ADA and required no separate analysis.

for reasonable accommodation. Rather than rebut Pfizer's legal argument, in her opposition Ruiz Rivera asserted only that reconsideration was inappropriate. The District Court, in response, reversed course and issued an Order granting Pfizer's Motion for Reconsideration and dismissing the regarded as claim.[5] Ruiz Rivera timely appealed that ruling to this Court, though she did not appeal the District Court's grant of summary judgment on the failure to accommodate claim.

II. Standard of Review

We review a district court's decision to grant or deny a motion for reconsideration under Rules 59(e) and 60(b) of the Federal Rules of Civil Procedure for manifest abuse of discretion. *See Kansky v. Coca-Cola Bottling Co. of New England,* 492 F.3d 54, 60 (1st Cir. 2007); *DiMaio Family Pizza & Luncheonette, Inc. v. Charter Oak Fire Ins. Co.,* 448 F.3d 460, 462 (1st Cir. 2006). This is the case because the district court has substantial discretion and broad authority to grant or deny such a motion. *United States v. 5 Bell Rock Rd.,*

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[5] The January 8, 2007 Order stated, in full:

> Defendant's Motion for Reconsideration (docket No. 67) is GRANTED. Accordingly, the claims for termination due to Plaintiff's perceived disability under the Americans with Disabilities Act and Puerto Rico Law No. 44 of July 2, 1985, as amended, are hereby DISMISSED based on the arguments presented by defendant in its request for reconsideration.

896 F.2d 605, 611 (1st Cir. 1990). A court appropriately may grant a motion for reconsideration "where the movant shows a manifest error of law or newly discovered evidence." *Kansky,* 492 F.3d at 60. Likewise, a motion for reconsideration should be granted if the court "has patently misunderstood a party . . . or has made an error not of reasoning but apprehension." *Sandoval Diaz v. Sandoval Orozco,* No. 01-1022, 2005 WL 1501672, at *2 (D.P.R. June 24, 2005) (quoting *Bank of Waunakee v. Rochester Cheese Sales, Inc.,* 906 F.2d 1185, 1191 (7th Cir. 1990)).[6]

We review the district court's entry of summary judgment de novo. *Desrosiers v. Hartford Life & Accident Co.,* 515 F.3d 87, 92 (1st Cir. 2008). Summary judgment is proper where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). As was the case in the District Court, we must take the facts of record in the light most flattering to the

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[6] In her appellate brief, Ruiz Rivera explicitly sets forth as issues on appeal *only* the propriety of the district court's decision to reconsider its denial of summary judgment on the regarded as claims under the ADA and Law 44. Her argument in support, however, addresses primarily the substantive issue of whether summary judgment on these claims was appropriate. We consider the appeal to be both a challenge to the reconsideration and the entry of summary judgment. As to Ruiz Rivera's appeal of the district court's granting of Pfizer's motion for reconsideration, we find no manifest abuse of discretion. As to Ruiz Rivera's appeal of the district court's decision, on reconsideration, to grant Pfizer's motion for summary judgment on the regarded as claims, our discussion follows herein.

nonmovant (here, Ruiz Rivera) and draw all reasonable inferences in her favor. *See Iverson v. City of Boston,* 452 F.3d 94, 98 (1st Cir. 2006); *Dávila v. Corporación De Puerto Rico Para La Difusión Pública,* 498 F.3d 9, 12 (1st Cir. 2007). "Once the moving party avers the absence of genuine issues of material fact, the nonmovant must show that a factual dispute does exist." *Velázquez-Fernández v. NCE Foods, Inc.,* 476 F.3d 6, 10 (1st Cir. 2007). Summary judgment cannot be defeated, however, "by relying on improbable inferences, conclusory allegations, or rank speculation." *Id.*

III. The Regarded As Claim

The ADA provides "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." *Katz v. City Metal Co.,* 87 F.3d 26, 30 (1st Cir. 1996) (quoting 42 U.S.C. § 12101(b)(1)). To establish a prima facie case of disability discrimination under the ADA, a plaintiff must prove: (1) that she was "disabled" within the meaning of the ADA; (2) that she was able to perform the essential functions of her job with or without accommodation; and (3) that she was discharged or adversely affected, in whole or in part, because of her disability. *Id.*; *see also Orta-Castro v. Merck, Sharp & Dohme Química P.R., Inc.,* 447 F.3d 105, 111 (1st Cir. 2006). For purposes of the ADA, one is considered disabled if she (a) has a physical or mental impairment that substantially limits one or more of her major life activities; (b) has a record of

such an impairment; or (c) is regarded as having such an impairment. *Bailey v. Georgia-Pacific Corp.*, 306 F.3d 1162, 1166 (1st Cir. 2002); *see also* 42 U.S.C. § 12102(2). The regarded as prong of the ADA exists to cover those cases "in which 'myths, fears and stereotypes' affect the employer's treatment of an individual," *Plant v. Morton Int'l, Inc.*, 212 F.3d 929, 938 (6th Cir. 2000) (quoting 29 C.F.R. § 1630.2(*l*)), because Congress has recognized that "society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment." *Sullivan v. Neiman Marcus Group, Inc.*, 358 F.3d 110, 117 (1st Cir. 2004) (citations omitted).

Regarded as claims primarily fall into one of two categories: "(1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities." *Sullivan*, 358 F.3d at 117 (citing *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489 (1999)).

"A plaintiff claiming that he is 'regarded' as disabled cannot merely show that his employer perceived him as somehow disabled; rather, he must prove that the employer regarded him as disabled within the meaning of the ADA." *Bailey*, 306 F.3d at 1169. When "working" is the major life activity at issue, a plaintiff "must demonstrate not only that the employer thought that he was impaired in his ability

to do the job that he held, but also that the employer regarded him as substantially impaired in 'either a class of jobs or a broad range of jobs in various classes as compared with the average person having comparable training, skills, and abilities.'" *Sullivan*, 358 F.3d at 117 (quoting *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516, 523 (1999)).

Because Ruiz Rivera did not appeal the District Court's dismissal of her failure to accommodate claim, that issue is not before us. *Ruiz Rivera*, 463 F. Supp. 2d at 177. Therefore, it is the law of the case that for the periods of time relevant to this inquiry Ruiz Rivera was not disabled within the meaning of the ADA, did not have an impairment that substantially limited a major life activity, and Pfizer was not obligated to accommodate her. On appeal, however, Ruiz Rivera appears to continue to press her argument that her impairment renders her disabled and entitles her to accommodation, while simultaneously arguing that Pfizer mistakenly believed her to be substantially limited in a major life activity, regarded her as disabled, and terminated her as a result of this perception of disability.

From our review of Ruiz Rivera's submissions, from the Complaint to her papers on appeal, it is apparent that her regarded as claim is really nothing more than a poorly disguised version of her failure to accommodate claim. In fact, the initial pleading of her regarded as claim was so indistinct that Pfizer did not even move for summary judgment on that claim, apparently because it was unaware it had even been

raised.[7] Indeed, the first time Ruiz Rivera spells out her regarded as theory is in her Opposition to Pfizer's Motion for Summary Judgment, something that Pfizer strenuously, but unsuccessfully objected to as being an "11th Hour" claim. On appeal, with the failure to accommodate claim not on review, the only issue is whether the District Court erred in granting summary judgment on the regarded as claim, on a motion for reconsideration, after initially finding material facts in dispute and denying the motion. We can understand how the District Court may have been tripped up over this issue given the way in which Ruiz Rivera has plead and argued the case. But in the end, we think the District Court got to the right result, as we will explain.

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[7] The Complaint states, in pertinent part:

41. Plaintiff alleges that the employer's termination because of plaintiff's disability was in violation of 42 USCA sec. 12112(a).

. . .

43. Plaintiff is "disabled" as defined by ADA, 42 USCA sec. 12102(2), in that she has a record of a physical and mental impairment that substantially limits one or more of her major life activities in that plaintiff's disability, to wit: a herniated disc and carpal tunnel syndrome. . . .

. . .

45. On March 27, 1999, Pfizer intentionally discriminated against plaintiff because of her disability as described above in that Pfizer terminated plaintiff because of her perceived disability.

We begin with the Complaint itself. As noted above, Ruiz Rivera's Complaint does not separate her failure to accommodate claim and her regarded as claim into distinct causes of action. The "First Cause of Action," which alleges that Pfizer's "termination because of plaintiff's disability was in violation of" the ADA, contains nothing that would signal to a reader that it intended to raise a regarded as claim. Instead, it affirmatively declares that Ruiz Rivera is "disabled," because "she has a record of a physical and mental impairment that substantially limits one or more of her major life activities." There is no factual allegation that Ruiz Rivera had any non-limiting impairment which Pfizer wrongly regarded as limiting a major life activity; any allegation that Pfizer had "stereotyped" her; or anything in fact that could remotely be characterized as a description of an impairment being mischaracterized or misperceived. Rather, the only indication that a regarded as claim might have been lurking in the shadows of the Complaint was the inclusion of the word "perceived" in one paragraph of her eleven paragraph First Cause of Action.

Paragraph 45 of the Complaint alleges: "On March 27, 1999, Pfizer intentionally discriminated against plaintiff because of her disability as described above in that Pfizer terminated plaintiff because of her *perceived* disability." (Emphasis added). While this paragraph could signal to a defendant that plaintiff is asserting a regarded as claim, with no facts alleged to explain any false perception on

Pfizer's part, and no facts alluding to any non-limiting impairment which Pfizer mistakenly believed to be substantially limiting, this allusion falls far short of the mark. As recently clarified by the Supreme Court, "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions," *Bell Atl. Corp. v. Twombly,* 127 S. Ct. 1955, 1965-66 (2007) (citations omitted), and "[t]o survive Rule 12(b)(6) dismissal, [a plaintiff's] well-pleaded facts must 'possess enough heft to sho[w] that [plaintiff is] entitled to relief.'" *Clark v. Boscher,* 514 F.3d 107, 112 (1st Cir. 2008) (quoting *Twombly,* 127 S. Ct. at 1959). The fundamental purpose of our pleadings rules is to protect a defendant's "inalienable right to know in advance the nature of the cause of action being asserted against him." *Rodriguez v. Doral Mortgage Corp.,* 57 F.3d 1168, 1171 (1st Cir. 1995). We do not think that the mere inclusion in the Complaint of the word "perceived" was enough to put Pfizer on notice that Ruiz Rivera was making a regarded as claim against it. On this basis alone, the regarded as claim was subject to dismissal.

Moreover, the Supreme Court has implied that regarded as claims under the ADA require an even greater level of specificity than other claims. *Sutton,* 527 U.S. at 489-91. In order to allege an actionable regarded as claim, a plaintiff must select and identify the major life activity that she will attempt to prove the employer regarded as being substantially limited by her impairment. *See Sutton,* 527 U.S. at 491

(dismissing ADA regarded as claim in part for inadequacy of its pleading, wherein the petitioners failed to state "a claim that respondent regard[ed] their impairment as substantially limiting their ability to work"); *see also Amadio v. Ford Motor Co.*, 238 F.3d 919, 925 (7th Cir. 2001); *Kaiser v. Banc of Am. Inv. Servs., Inc.*, 296 F. Supp. 2d 1219, 1221 (D. Nev. 2003).

It is apparent from our review that at the time Ruiz Rivera filed her Complaint, regarded as disability discrimination was barely an afterthought – a throwaway line in one paragraph of a lengthy complaint. Faced with a well-reasoned and convincing motion for summary judgment on her ADA claim, however, Ruiz Rivera shifted legal theories and sought to re-characterize her Complaint in a way that might parry Pfizer's blow. It simply will not do for a plaintiff to fail to plead with adequate specificity facts to support a regarded as claim, all-the-while hoping to play that card if her initial hand is a dud. *See Fleming v. Lind-Waldock & Co.*, 922 F.2d 20, 24 (1st Cir. 1990) ("[S]ummary judgment is not a procedural second chance to flesh out inadequate pleadings.").

Ruiz Rivera's regarded as claim also fails on substantive grounds. The undisputed facts[8] reveal

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[8] From our review of the record, it appears that both Pfizer and Ruiz Rivera submitted, without translation, Spanish language documents as exhibits to their briefs at the summary judgment stage. Documents may not be submitted in a foreign language without translations. *See* L.R.P.R. 10, 43; First Circuit

(Continued on following page)

that, in late March 2007, Ruiz Rivera presented to Dr. Felix at Pfizer a list of workplace restrictions imposed by her doctor based on her various ailments. Her doctor's note indicated that the restrictions should remain in place for at least six months, perhaps longer. Based on these restrictions – and these restrictions alone – Pfizer determined that Ruiz Rivera could not perform the essential tasks of her job as a packaging operator in the bottling department. Ruiz Rivera maintains that she then sought accommodation for her limitations and in doing so requested that she be given a different job at the facility.[9] Pfizer denied Ruiz Rivera's request, and, according to the testimony of Frances Guzman, Assistant Personnel Manager, informed Ruiz Rivera that Pfizer did not

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L.R. 30(d) ("The court will not receive documents not in the English language unless translations are furnished."). As is our policy, we cannot consider materials, or facts adduced solely in reliance on those materials, that have not been translated. Along with its appellate briefing, Pfizer provided translations of relevant exhibits and those portions of Ruiz Rivera's deposition upon which it has relied. However, the record may not be supplemented on appeal in order to cure a defect below. *See Estades-Negroni v. Assocs. Corp. of N. Am.*, 359 F.3d 1, 2 (1st Cir. 2004) ("Depositions that have not been translated into English are not – and cannot on appeal become – part of the record.").

[9] Ruiz Rivera requested a move from the position of packaging operator to one of the following: inspecting blisters, filling out documentation, or entering a lot with a finger machine. She provides no support for her contention that these jobs were available at the plant, or that the restrictions imposed by her doctor would not impact the work performed in these positions.

consider her to be disabled within the meaning of the ADA and Pfizer was under no obligation to accommodate her.

These undisputed facts, of course, were the basis for Ruiz Rivera's now-dismissed claims for termination and failure to accommodate. She asserted that the impairments upon which her doctor's restrictions were based constituted a disability under the ADA which Pfizer was required to reasonably accommodate. Pfizer disagreed, concluding that Ruiz Rivera was not disabled within the meaning of the ADA, and thus not entitled to any accommodation, and the District Court concurred.[10] Now, Ruiz Rivera uses Pfizer's lawful refusal to provide her with the sought-after accommodation as the primary basis for her regarded as claim. Ruiz Rivera does not maintain that she could perform her job as packaging operator in the bottling department with the restrictions imposed by her doctor, but that Pfizer mistakenly believed her unable to do so; rather, she maintains that she could perform her job if granted the accommodations to which the District Court found she was not entitled. This, coupled with Pfizer's refusal to

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[10] The District Court determined that the impairment upon which Ruiz Rivera's workplace restrictions were based did not substantially limit her in any major life activity, including performance of manual tasks, working, and sitting and standing. *See Ruiz Rivera v. Pfizer Pharm. LLC*, 463 F. Supp. 2d 163, 172-75 (D.P.R. 2006).

accommodate Ruiz Rivera's request for a different job, is what forms the basis for her regarded as claim.

Specifically, Ruiz Rivera insists that Pfizer mistakenly regarded her as being substantially limited in the life activity of "working." For her support, she cites to two events: first, she cites Dr. Felix's response to the restrictions imposed by her personal physician, wherein Dr. Felix determined she could not return to and work at her position in the bottling department at the Pfizer plant; and second, she points to the comment allegedly made to her by Guzman to the effect that with the conditions imposed by her doctors, she could not perform any work at the Pfizer plant or anywhere else in the pharmaceutical industry. As correctly argued by Pfizer in its Motion for Reconsideration, Ruiz Rivera may not rely exclusively on her employer's recognition or implementation of the restrictions imposed by her own physician to establish a regarded as claim. *See Lusk v. Ryder Integrated Logistics,* 238 F.3d 1237, 1241 (10th Cir. 2001) ("Where the recognition of Plaintiff's limitations is not an erroneous perception, but is instead a recognition of fact, a finding that Plaintiff was regarded as disabled is inappropriate."); *Breitkreutz v. Cambrex Charles City, Inc.,* 450 F.3d 780, 783 (8th Cir. 2006) ("If a restriction is based upon the recommendations of physicians, then it is not based upon myths or stereotypes about the disabled and does not establish a perception of disability."); *see also Wooten v. Farmland Foods,* 58 F.3d 382, 386 (8th Cir. 1995) (employer who terminated

employee because of the restrictions associated with employee's impairment did not regard employee as disabled in the major life activity of working where its perception of employee's impairment was based not on speculation, stereotype, or myth, but on a doctor's written restrictions). Thus, Pfizer's recognition of Ruiz Rivera's impairment, and unwillingness to provide the accommodation that Ruiz Rivera sought, but to which she was not entitled, simply does not transform its actions into regarded as discrimination. Moreover, to allow this regarded as claim to stand would be tantamount to allowing her dismissed failure to accommodate claim in through the back door. *See Nuzum v. Ozark Auto. Distrib., Inc.*, 432 F.3d 839, 848-49 (8th Cir. 2005).

Although the District Court's reconsideration of its original decision to deny summary judgment on the regarded as claim lacked written justification, it is clear to us that dismissal on reconsideration was both appropriate and warranted. Any reliance on Dr. Felix's statements or opinion, based entirely on Ruiz Rivera's own doctor's recommendations, cannot support a regarded as claim. Furthermore, the allegation that Pfizer mistakenly regarded Ruiz Rivera to be substantially limited in the life activity of working makes little sense in the face of the undisputed record that Pfizer told Ruiz Rivera that it did not consider her impairment to constitute an ADA covered disability. Moreover, Pfizer did not terminate Ruiz Rivera's employment when it refused to accommodate the restrictions imposed by her doctor; rather,

it terminated her over nine months later, after numerous unsuccessful attempts to seek updates on her medical status. Finally, the isolated comment allegedly made by Guzman as to the impact of the restrictions on Ruiz Rivera's ability to find work in the pharmaceutical industry is of no help to Ruiz Rivera. At the time that Guzman allegedly made this comment, Pfizer had determined, in reliance upon Ruiz Rivera's own doctor's recommendations, that Ruiz Rivera could not perform the essential functions of her job; her impairment did not constitute a disability under the ADA; and it had no obligation to accommodate her. Thus, while Guzman may have considered the restrictions imposed by Ruiz Rivera's doctors as limiting her chances of finding work elsewhere in the pharmaceutical industry, there simply is no evidence that Ruiz Rivera was refused accommodation or terminated because of this generalization. In light of the record, Guzman's statement at worst amounts to little more than a stray remark, one which standing alone is insufficient to defeat summary judgment. *See Patten v. Wal-Mart Stores E., Inc.*, 300 F.3d 21, 25 (1st Cir. 2002) (direct evidence of discrimination excludes "mere background noise" and "stray remarks"); *Laurin v. Providence Hosp.*, 150 F.3d 52, 58 (1st Cir. 1998) (stray remarks, including "statements by decisionmakers unrelated to the decisional process itself normally are insufficient to establish discriminatory animus") (citations omitted).

IV. Law 44

On reconsideration, the District Court also dismissed Ruiz Rivera's parallel regarded as claim under Law 44 of July 2, 1995, P.R. Laws Ann. tit. 1, §§ 501 et seq., the Puerto Rico analogue to the ADA. Because Law 44 and the ADA are coterminous, we affirm the District Court's dismissal of both regarded as claims. *See Gonzalez v. El Dia, Inc.*, 304 F.3d 63, 74 n.8 (1st Cir. 2002).

V. Law 80

Ruiz Rivera asserts on appeal that the District Court erred when it failed to address and state whether it was going to exercise supplemental jurisdiction over Ruiz Rivera's purported Law 80 claim. While the issue of whether to retain supplemental jurisdiction over any remaining state law claim, and the viability of any such claim, is generally for the District Court in the first instance, we believe the Law 80 claim, on its face, is so inadequately plead that the District Court acted appropriately and committed no error by not addressing the issue.[11]

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[11] We note that Ruiz Rivera's appellate brief marks her first substantive mention of the Law 80 claim. Pfizer did not move specifically for its dismissal, Ruiz Rivera did not assert its viability in her Opposition to Pfizer's Motion for Summary Judgment, and the District Court did not address the issue in either of its Orders.

"Puerto Rico Law 80 prohibits dismissal of employees without just cause." *Hoyos v. Telecorp Comm'ns, Inc.*, 488 F.3d 1, 6 (1st Cir. 2007). Nowhere in the Complaint does Ruiz Rivera allege termination for lack of just cause. Likewise, Ruiz Rivera does not raise Law 80 as one of her several causes of action. Instead, the sole reference to Law 80 in the Complaint is in the first paragraph, titled "Introduction," which lists Law 80 as one of many statutes under which the action was brought. There are no facts plead in support of this claim, and it is not raised in her Third Cause of Action, which alleges violation of various laws of Puerto Rico, specifically "Art. II section 7 of the Constitution of Puerto Rico; Act 100 of June 30, 1959, Act 3 of March 13, 1942, Act 69 of July 6, 1985 and Act 60 of May 30, 1976."

Thus, it appears on the face of the Complaint that the Law 80 claim fails to meet the most basic of pleading requirements, as it consists of nothing more than a solitary statutory reference, with nothing to support it. A plaintiff may not simply throw a statutory reference into a complaint hoping to later flesh out its claim with facts in support. "[A] simple request for relief without stating any grounds therefor is inadequate." *Pujol v. Shearson/Am. Express, Inc.*, 829 F.2d 1201, 1207 (1st Cir. 1987). Because the reference to Law 80 was so fleeting and inadequate, there was nothing for the District Court to review. There was no error in its non-review of this non-issue.

VI. Conclusion

For the reasons stated above, the District Court's January 8, 2007 Order is ***AFFIRMED***.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

DELIA RUIZ RIVERA, Plaintiff,	)	
v.	)	CIVIL NO. 01-1757 (RLA)
PFIZER PHARMACEUTICAL LLC, Defendant.	)	

ORDER IN THE MATTER OF PLAINTIFF'S DISABILITY CLAIMS

Plaintiff instituted these proceedings alleging discrimination based on her disability as well as her sex. Only the claims asserted under the Americans with Disabilities Act ("ADA")[1] and Law No. 44 of July 2, 1985, as amended, ("Law 44")[2] remain pending[3] which defendant has moved to dismiss by way of summary judgment. The court having reviewed the arguments presented by the parties as well as the documents in the court's record, FINDS as follows:

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[1] 42 U.S.C. § 12101-12213.

[2] P.R. Laws Ann. tit. 1, §§ 501-511 (supp.2006).

[3] *See*, Partial Judgment Dismissing Sexual Harassment and Pregnancy Discrimination Claims (docket No. 44).

I. BACKGROUND

According to plaintiff, defendant refused to provide her with the necessary accommodation at work and subsequently terminated her from employment due to her disability. In the alternative, plaintiff argues that she was terminated "because of her perceived disability."[4] Defendant, on the other hand, contends that plaintiff is not disabled within the meaning of ADA nor was she perceived as disabled.

II. THE FACTS

The following uncontested relevant facts appear from the evidence submitted in this case:

1. Plaintiff commenced working with the defendant on a temporary basis as a packaging operator in defendant's Bottling Department at the end of 1997.

2. In November 1998, plaintiff became a regular employee continuing in the same position. On June 1, 1999, plaintiff submitted a medical certificate from her gynecologist, Dr. Gonzalez Camacho, indicating that plaintiff was 8 weeks pregnant and recommending that she avoid walking long distances.

3. No adjustments to her work demands were provided in response thereto.

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[4] Amended Complaint (docket No. 13) ¶ 45.

4. On August 14, 1999, plaintiff tendered another medical certificate from Dr. Gonzalez Camacho informing that plaintiff was now 18 weeks pregnant and was suffering from edema in her legs and feeling numbness in her extremities. He recommended that she should only work day shifts and in a seated position. On August 16, 1999, Dr. Gonzalez Camacho specified that this recommendation should extend until January 3, 2000.

5. The request for a seated accommodation was prompted by plaintiff's herniated disc.

6. No accommodation was provided at this time. Rather, Dr. Felix, Pfizer's in-house physician, authorized plaintiff a one-week leave of absence from August 16, 1999, until August 22, 1999.

7. On August 23, 1999, plaintiff was evaluated by Dr. Felix, who allowed her to return to her regular work without restrictions "pending coordination to work sitting down."

8. One week later, on August 30, 1999, plaintiff submitted a medical certificate signed by Dr. Oscar Ramos, a physiatrist. Dr. Ramos indicated that he had evaluated plaintiff on that day due to a left lumbo-sacral radiculopathy probably due to a herniated disc and that she would start medical treatment. The physician advised that plaintiff should be excused from work from August 30, 1999, to November 1, 1999.

9. Accordingly, plaintiff was authorized medical leave under the temporary non-occupational disability leave (SINOD) for these conditions from September 1, 1999, to November 1, 1999.

10. On November 2, 1999, plaintiff was again authorized a SINOD leave through January 1, 2000, for her back condition.

11. Plaintiff gave birth to her second child on December 31, 1999, and was authorized an eight-week maternity leave through February 24, 2000.

12. On February 25, 2000, the day plaintiff was due to return to work, she submitted a medical certificate signed by Dr. Ramos indicating that plaintiff was being treated for left Carpal Tunnel Syndrome and Lumbo Sacral Disc Herniation. The physician indicated that although plaintiff was fit to return to work there were some restrictions that should be implemented at her work. These restrictions were:

- Avoid repetitive motions of hands.
- Avoid hand-over-shoulders position.
- Limit lifting-pushing-holding-bending.
- Do not lift over 25 lbs.

13. On February 25, 2000, plaintiff also submitted a certificate from Dr. Norberto Pellot Moran who diagnosed her with a major depression caused by the herniated disc. Accordingly, on that day plaintiff was granted SINOD benefits through March 25, 2000.

14. Plaintiff returned to work on March 27, 2000, whereupon she was evaluated by Dr. Felix to ensure she was fit to return to work. At that time plaintiff insisted on defendant implementing the restrictions specified by her physiatrist. However, Dr. Felix indicated that there was no opportunity for her to remain working at the plant with these limitations. Dr. Felix telephoned Dr. Ramos to evaluate plaintiff and subsequently discuss her therapeutic options.

15. Dr. Felix prepared a consultation form for Dr. Ramos for evaluation and recommendations regarding plaintiff's treatment options and rehabilitation to perform her tasks at work.

16. Plaintiff was sent home until further notice and until receiving her physiatrist's opinion.

17. On March 30, 2000, plaintiff reported back to work. She was seen by Dr. Felix for her fit for duty evaluation at which time she provided him the consultation report from Dr. Ramos which, in pertinent part, reads:

> Diagnosis
>
> Left Carpal Tunnel Syndrome
> Both Wrists Tendinitis
> L5S1 Discs Herniation
>
> These are progressive diseases and may deteriorate her condition. She uses writs splinters at night and gets anti-inflammatory and muscle relaxants, and needs to protect the affected areas from damage.

Actually she is not a surgical candidate for CTS or HNP.

She should have some restrictions at her work area, so she can do her job with minimal deterioration of her condition. These restrictions should last at least six months, but may be longer.

- Avoid repetitive motions of hands
- Avoid hands-over-the shoulders position
- Do not lift over 25 lbs.
- Limit lifting-carrying-pushing-pulling-holding-bending.

18. Dr. Felix concluded that, "[i]n view of this [sic] recommendations and after conversation with [plaintiff's] work area supervisor where she can not perform the essential tasks of her job and needs her hands I do not recommend a RTW [return to work] to prevent further aggravation or lesion. Case discussed [with] HR [Human Resources] for plan of action."

19. Frances Guzman, Pfizer's Assistant Personnel Manager, advised plaintiff that with the conditions imposed by her physicians she had no chance of working either at Pfizer or at any other pharmaceutical company in the industry.

20. Plaintiff did not return to work.

21. On December 22, 2000 Pfizer sent plaintiff a letter requesting her to report to work on December 28, 2000. Plaintiff did not appear nor did she excuse her absence.

22. On January 16, 2001 plaintiff was given an ultimatum. Either she reported to work by January 22, 2001 or she would be terminated.

III. SUMMARY JUDGMENT STANDARD

Rule 56(c) Fed. R. Civ. P., which sets forth the standard for ruling on summary judgment motions, in pertinent part provides that they shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Sands v. Ridefilm Corp.*, 212 F.3d 657, 660-61 (1st Cir.2000); *Barreto-Rivera v. Medina-Vargas,* 168 F.3d 42, 45 (1st Cir.1999). The party seeking summary judgment must first demonstrate the absence of a genuine issue of material fact in the record. *DeNovellis v. Shalala,* 124 F.3d 298, 306 (1st Cir.1997). A genuine issue exists if there is sufficient evidence supporting the claimed factual disputes to require a trial. *Morris v. Gov't Dev. Bank of Puerto Rico,* 27 F.3d 746, 748 (1st Cir. 994); *LeBlanc v. Great Am. Ins. Co.,* 6 F.3d 836, 841 (1st Cir.1993), *cert. denied,* 511 U.S. 1018, 114 S.Ct. 1398, 128 L.Ed.2d 72 (1994). A fact is material if it might affect the outcome of a lawsuit under the governing law. *Morrissey v. Boston Five Cents Sav. Bank,* 54 F.3d 27, 31 (1st Cir. 1995).

"In ruling on a motion for summary judgment, the court must view 'the facts in the light most favorable to the non-moving party, drawing all reasonable

inferences in that party's favor.'" *Poulis-Minott v. Smith,* 388 F.3d 354, 361 (1st Cir. 2004) (citing *Barbour v. Dynamics Research Corp.,* 63 F.3d 32, 36 (1st Cir. 1995)).

Credibility issues fall outside the scope of summary judgment. "'Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.'" *Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, 150, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) (citing *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). *See also, Dominguez-Cruz v. Suttle Caribe, Inc.,* 202 F.3d 424, 432 (1st Cir. 2000) ("court should not engage in credibility assessments."); *Simas v. First Citizens' Fed. Credit Union,* 170 F.3d 37, 49 (1st Cir. 1999) ("credibility determinations are for the factfinder at trial, not for the court at summary judgment."); *Perez-Trujillo v. Volvo Car Corp.,* 137 F.3d 50, 54 (1st Cir. 1998) (credibility issues not proper on summary judgment); *Molina Quintero v. Caribe G.E. Power Breakers, Inc.,* 234 F.Supp.2d 108, 113 (D.P.R. 2002). "There is no room for credibility determinations, no room for the measured weighing of conflicting evidence such as the trial process entails, and no room for the judge to superimpose his own ideas of probability and likelihood. In fact, only if the record, viewed in this manner and without regard to credibility determinations, reveals no genuine issue as to any material fact may the court enter summary judgment." *Cruz-Baez v. Negron-Irizarry,*

360 F.Supp.2d 326, 332 (D.P.R. 2005) (internal citations, brackets and quotation marks omitted).

In cases where the non-movant party bears the ultimate burden of proof, he must present definite and competent evidence to rebut a motion for summary judgment, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 256-257, 106 S.Ct. 2505, 91 L.Ed.2d 202; *Navarro v. Pfizer Corp.*, 261 F.3d 90, 94 (1st Cir. 2001); *Grant's Dairy v. Comm'r of Maine Dep't of Agric.*, 232 F.3d 8, 14 (1st Cir. 2000), and cannot rely upon "conclusory allegations, improbable inferences, and unsupported speculation". *Lopez-Carrasquillo v. Rubianes*, 230 F.3d 409, 412 (1st Cir. 2000); *Maldonado-Denis v. Castillo-Rodríguez*, 23 F.3d 576, 581 (1st Cir. 1994); *Medina-Muñoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 8 (1st Cir. 1990).

IV. ADA

The ADA prescribes that no employer "shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to . . . discharge of employees . . . and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). The term "discriminate" includes the employer's failure to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability". 42 U.S.C. § 12112(b)(5)(A).

Although the evidentiary paradigm for establishing a prima facie discrimination claim in termination

actions is different from that applicable to a failure to accommodate claim, both causes of action require that the plaintiff be disabled within the meaning of the ADA.

In cases where a plaintiff alleges that an adverse employment action was taken due to a disability the "burden-shifting framework outlined by the Supreme Court in McDonnell-Douglas" is used. *Tobin v. Liberty Mut. Ins. Co.*, 433 F.3d 100, 104 (1st Cir. 2005).

Accordingly, in order to qualify for the ADA's protection in this case, plaintiff has the initial burden of establishing that: (1) she suffers from a "disability" within the meaning of the ADA; (2) she was able to perform the essential functions of her position with or without reasonable accommodation; and (3) the employer's adverse employment actions were based in whole or in part on her disability. *Orta-Castro v. Merck, Sharp & Dohme Quimica P.R., Inc.*, 447 F.3d 105, 111 (1st Cir. 2006); *Tobin*, 433 F.3d at 104; *Bailey v. Georgia-Pacific Corp.*, 306 F.3d 1162, 1166 (1st Cir. 2002); *Carroll v. Xerox Corp.*, 294 F.3d 231, 238 (1st Cir. 2002); *Gillen v. Fallon Ambulance Serv., Inc.*, 283 F.3d 11, 18 (1st Cir. 2002); *Quint v. A.E. Staley Mfg. Co.*, 172 F.3d 1, 9 n. 3 (1st Cir. 1999); *Tardie v. Rehab. Hosp. of Rhode Island*, 168 F.3d 538, 541 (1st Cir. 1999).

A failure-to-accommodate claim, on the other hand, has a different set of requirements, all of which must be met if plaintiff is to survive a motion for summary judgment. The First Circuit Court of Appeals has

listed these as: (a) plaintiff must furnish sufficient admissible evidence that she is a qualified individual with a disability within the meaning of the ADA; (b) that she worked for an employer covered by the ADA; (c) that the employer, despite its knowledge of the employee's physical limitations, did not accommodate those limitations; (d) that the employer's failure to accommodate the known physical limitations affected the terms, conditions, or privileges of the plaintiff's employment. *Orta-Castro,* 447 F.3d at 112; *Tobin,* 433 F.3d at 107; *Higgins v. New Balance Athletic Shoe,* 194 F.3d 252, 264 (1st Cir. 1999).

The term "disability" as defined in the statute is "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. § 12102(2)(A). Hence, plaintiff's initial step in establishing a disability claim under the ADA is to present evidence of a physical or mental impairment. *Toyota Motor Mfg., Kentucky, Inc. v. Williams,* 534 U.S. 184, 194, 122 S.Ct. 681, 691, 151 L.Ed.2d 615 (2002).

In making our determination under the ADA, the particular circumstances attendant to plaintiff's condition must be examined. "[T]he existence of a disability [must] be determined in . . . a case-by-case manner." *Toyota,* 534 U.S. at 198, 122 S.Ct. 681. "Whether a person has a disability under the ADA is an 'individualized inquiry.'" *Bailey,* 306 F.3d at 1167 (citing *Sutton v. United Air Lines, Inc.,* 527 U.S. 471, 483, 119 S.Ct. 2139, 144 L.Ed.2d 450 (1999)); *Carroll,* 294 F.3d at 238.[)]

However, having an impairment in and of itself is not sufficient to be entitled to ADA's protection. It is imperative that the impairment also have a substantial effect on a major life activity. *Toyota,* 534 U.S. at 195; *Sullivan v. Neiman Marcus Gp., Inc.,* 358 F.3d 110, 115 (1st Cir. 2004); *Whitlock v. Mac-Gray, Inc.,* 345 F.3d 44, 46 (1st Cir. 2003); *Bailey,* 306 F.3d at 1167; *Carroll,* 294 F.3d at 238.

Hence, evidence of an impairment supported only by a medical diagnosis is inadequate to prove a disability within the provisions of the ADA. "It is insufficient for individuals attempting to prove disability status under this test to merely submit evidence of a medical diagnosis of an impairment." *Toyota,* 534 U.S. at 198; *Whitlock,* 345 F.3d at 46; *Calef v. Gillette Co.,* 322 F.3d 75, 83 (1st Cir. 2003); *Bailey,* 306 F.3d at 1167.

In this regard, a physician's "conclusory assertion of total disability – an assertion lacking elaboration and support in the record – [is not] sufficient to make the individualized showing of [plaintiff's] particular limitations". *Whitlock,* 345 F.3d at 46. *See also, Gonzalez v. El Dia, Inc.,* 304 F.3d 63, 74 (1st Cir. 2002) ("testimony presented by the treating physician [was] highly conclusory.")

"Instead, the ADA requires [that claimants submit] . . . evidence that the extent of the limitation caused by their impairment in terms of their own experience is substantial." *Toyota,* 534 U.S. at 198 (citation and internal marks omitted.) That is, "[a]n

ADA plaintiff must offer evidence demonstrating that the limitation caused by the impairment is substantial in terms of his or her own experience." *Bailey,* 306 F.3d at 1167.

The ADA does not define the term "substantially limits." The Supreme Court has stated that "'substantially' in the phrase 'substantially limits' suggests 'considerable' or 'to a large degree'." *Toyota,* 534 U.S. at 196. "A substantial limitation cannot include any impairment which interferes in only a minor way with the performance of manual tasks, and the phrase 'major life activities' refers to only those activities which are of central importance to daily life." *Benoit,* 331 F.3d at 176 (citations and internal quotation marks omitted).

On the other hand, "'[m]ajor' in the phrase 'major life activities' means important . . . ' Major life activities' thus refers to those activities that are of central importance to daily life." *Toyota,* 534 U.S. at 198; *Bailey,* 306 F.3d at 1167. *See also, Benoit,* 331 F.3d at 176 (if no major life activity is affected the impairment is not considered a "disability" under ADA); *Guzman-Rosario v. United Parcel Service, Inc.,* 397 F.3d 6, 10 (1st Cir. 2005) (whether plaintiff's "condition impinged sufficiently on a 'major life activity' to be treated as disabling."[).]

Temporary conditions are not covered by ADA. "The impairment's impact must also be permanent or long term." *Toyota,* 534 U.S. at 198; *Guzman-Rosario,* 397 F.3d at 10; *Sullivan,* 358 F.3d at 116; *Benoit v.*

Technical Mfg. Corp., 331 F.3d 166, 176 (1st Cir. 2003); *Carroll*, 294 F.3d at 238.

A. DISABLED

We find no evidence in the record showing that plaintiff specifically identified the major life activities that were being purportedly limited by her conditions, either at the time she requested accommodation or when she was allegedly terminated from employment. Faced with this scenario, defendant's arguments address alternate theories of liability under the ADA, premised on either plaintiff's disability based on substantial limitations in performing manual tasks, or substantial limitation in the major life activity of working. The motion is centered on the evidence available to the employer at the relevant period of time which, as previously noted, only made reference to plaintiff's carpal tunnel syndrome, tendinitis, lumbo sacral disc herniation and restrictions regarding: repetitive hand motions; hand-over-shoulders position; lifting-pushing-holding-bending, and lifting over 25 pounds.[5]

(1) Manual Tasks

We agree with the defendant that the record does not support a finding of a substantial impairment to

[5] There is no evidence as to how a weight-lifting restriction of 25 pounds constitutes a significant impairment in plaintiff's particular case.

plaintiff's ability to carry out manual tasks. *See, i.e., Toyota,* 534 U.S. at 196 (plaintiff must "establish a substantial limitation in the specific major life activity of performing manual tasks.") "In order for performing manual asks to fit into this category – a category that includes such basic abilities as walking, seeing, and hearing – the manual tasks in question must be central to daily life. If each of the tasks included in the major life activity of performing manual tasks does not independently qualify as major life activity, then together they must do so." *Id.* at 197.

"[T]o be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives." *Id.* at 198.

In making its analysis, the court must consider claimant's ability to tend to his own personal hygiene and to carry out personal and household chores. *See, Id.* at 201-202 ("household chores, bathing, and brushing one's teeth are among the types of manual tasks of central importance to people's daily lives, and should have been part of the assessment of whether [claimant] was substantially limited in performing manual tasks.")

The limitations imposed must be substantial. For instance, the Supreme Court has ruled that "changes in [claimant's] life [i.e., avoid sweeping, quit dancing, occasionally seek help dressing and reducing how

often played with children, tended her garden and drove long distances] did not amount to such severe restrictions in the activities that are of central importance to most people's daily lives that they establish a manual task disability as a matter of law." *Toyota,* 534 U.S. at 202.

Further, the inquiry must focus on the daily restrictions actually being imposed by the impairment, not the possible interference with work-related duties. "When addressing the major life activity of performing manual tasks, the central inquiry must be whether the claimant is unable to perform the variety of tasks central to most people's daily lives, not whether the claimant is unable to perform the tasks associated with her specific job." *Id.* at 200. Thus, it is inappropriate for the court to "consider [ ] [claimant's] inability to do such manual work in her specialized assembly line job as sufficient proof that she was substantially limited in performing manual tasks." *Id.* In other words, there is "no support . . . for . . . idea that the question of whether an impairment constitutes a disability is to be answered only by analyzing the effect of the impairment in the workplace." *Id.* at 201.

In her deposition, plaintiff indicated that she was able to spend time and take care of her children; attend church services; read; prepare food at home; change her baby's diapers; drive; sweep and clean her house; wash dishes; move merchandise in her current job; make and receive phone calls, and type.

As defendant points out, plaintiff did have physical limitations which were documented by her physicians, i.e., carpal tunnel syndrome, herniated disc and tendinitis. She failed, however, in demonstrating how these particular conditions substantially limited a major life activity, specifically, her ability to perform manual tasks. The limitations imposed by her condition are circumscribed to a confined type of activities which by no means prevent her from carrying out substantial life activities as mandated by the statute.

(2) Working

As we continue our analysis, we must note the Supreme Court's skepticism to rule that "working" is a major life activity. *Sutton,* 527 U.S. at 492. *See, Guzman-Rosario,* 397 F.3d at 11. ("Awaiting a definite ruling from the Supreme Court otherwise, we have assumed that 'working' is a major life activity and applied the EEOC's framework in [disposing] plaintiffs' ADA claims."[);] *Sullivan,* 358 F.3d at 115 ("We will, as we have done in the past, assume without deciding that work may constitute a major life activity."); *Whitlock,* 345 F.3d at 46 n.1 ("We assume, without deciding, that working may constitute a major life activity for purposes of the ADA.") *Bailey,* 306 F.3d at 1168 n.5 ("We note that there is some doubt a[s] to whether the Supreme Court will ultimately accept 'working' as a major life activity under the ADA.")[.] *See also, Carroll,* 294 F.3d at 239 n.7 (although Supreme Court not yet addressed the issue court has assumed so).

The EEOC regulations,[6] however, define the major life activity of "working" and provide that the term "'substantially limits' means significantly restricted in the ability to perform **either a class of jobs or a broad range of jobs in various classes** as compared to the average person having comparable training, skills and abilities." 29 C.F.R. § 1630.2(j)(3)(I) (emphasis ours).

The EEOC Interpretative Guidance to the regulations provide how an individual's substantial limitation for work under the ADA should be construed:

> An individual is substantially limited in working if the individual is significantly restricted in the ability to perform a class or jobs or a broad range of jobs in various classes, when compared with the ability of the average person with comparable qualifications to perform those same jobs. For example, an individual who has a back condition that prevents the individual from performing any heavy labor job would be substantially limited in the major life activity of working because the individual's impairment eliminates his or her ability to perform a class of jobs. This would be even so

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[6] Although the EEOC regulations are commonly consulted by the courts in ADA cases, "no agency has been granted authority to issue binding regulations interpreting the term 'disability.'" *Guzman-Rosario*, 397 F.3d at 9 (*citing Toyota*, 534 U.S. at 194). *See also, Calef*, 322 F.3d at 85 ("Like the Supreme Court in *Toyota*, we do not pass on the validity of these regulations.")[.]

> if the individual were able to perform jobs in any other class, e.g., the class of semi-skilled jobs. Similarly, suppose an individual has an allergy to a substance found in most high rise office buildings, but seldom found elsewhere, that makes breathing extremely difficult. Since this individual would be substantially limited in the ability to perform the broad range of jobs in various classes that are conducted in high rise office buildings within the geographical area to which he or she has reasonable access, he or she would be substantially limited in working.

Hence, being unable to carry out a particular type of job does not qualify as a substantial limitation to the major life activity of working. *Sullivan,* 358 F.3d at 116. Plaintiffs must "show that they are precluded from more than the performance of a particular job." *Guzman-Rosario,* 397 F.3d at 11. "[T]he inability to perform a single, particular job does not constitute the required substantial limitation." *See, Toyota,* 534 U.S. at 201 ("claimant . . . required to show an inability to work in a broad range of jobs, rather than a specific job.") (citation and internal quotation marks omitted); *Whitlock,* 345 F.3d at 46. *See also, Benoit,* 331 F.3d at 176 (plaintiff only instructed to avoid "heavy lifting" and failed to show "that this precluded him from working in a substantial class or broad range of jobs.")

Based on the foregoing, even assuming that plaintiff had alleged that she was substantially

limited in the major life activity of working, her claim would still not survive. There is no evidence that plaintiff was not able to work in a substantial class of jobs or a broad range of jobs. Subsequent to her tenure at Pfizer, plaintiff was employed as an assistant at a physician's office manning the telephone and doing general secretarial/clerical work. She was also employed at a sandwich shop carrying out various duties such as cooking, cleaning and tending the cash register.

(3) Sitting and Standing

Rather than addressing defendant's arguments regarding her failure to establish substantial limitations to her major life activities of performing manual tasks and working, in her opposition to the summary judgment petition plaintiff argues instead that she "is substantially limited in her ability to sit and stand, both of which are major life activities."[7] The only evidence submitted by plaintiff in support of this position is a **May 21, 2002** medical report prepared by Dr. Oscar Arroyo Nieves, specialized in physical and rehabilitation medicine, who diagnosed plaintiff's condition as:

1. Chronic Low Back Pain
2. Lumbar Disc Disease L5 S1 (Herniation)
3. Lumbar Radiculopathy

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[7] Plaintiff's Opposition (docket No. 38) ¶¶ 10 and 28.

4. Fibriomiositis
5. Left CTS (Carpal Tunnel Syndrome)

In his assessment, Dr. Arroyo Nieves concluded that plaintiff had back pain as a result of a L5-S1 disc lesion. The physician further noted that plaintiff was receiving rehabilitation treatment. Dr. Arroyo Nieves recommended that plaintiff **should not remain seated or standing for long periods of time** and should alternate between these positions. Further, when lifting objects from the floor, plaintiff should bend her knees. Lastly, the physician indicated that plaintiff could continue carrying out her job duties.

As pointed out by defendant, the expert report submitted with plaintiff's opposition to the summary judgment request fails on various grounds.

No mention is made in the report of plaintiff's prior hand conditions specifically, carpal tunnel and tendinitis or her limitations as a result thereof as certified by Dr. Oscar Ramos, her physiatrist, in early 2000.

Further, the physician's recommendations do not meet the definition of substantial limitation set forth in the regulations which require that plaintiff either be "[u]nable to perform a major life activity that the average person in the general population can perform; or . . . [s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a major life activity as compared to the condition, manner or duration under which the average person in the general population can perform

that same major life activity." 29 C.F.R. § 1630.2(j)(1) (2006).

There is no reference in the report as to how long plaintiff could sit or stand nor how her limitations compare to the sitting and standing tolerance of the average population.

It is also important to note that plaintiff's counsel's argument in support of a disability based on her alleged substantial limitations in her ability to sit and stand are premised on the notion that plaintiff has "little tolerance to remain sitting or standing **even for shorts (sic) periods of time**".[8] However, this is **not** what the report says. Dr. Arroyo Nieves noted that plaintiff "should not remain seated or standing **for long periods of time**" which is a different assessment altogether.

Lastly, even assuming the report's conclusions are adequate, the report is dated **May 21, 2002** and there is no indication that these alleged limitations were present and to the same degree "at the time that [plaintiff] sought an accommodation from [defendant]." *Toyota,* 534 U.S. at 196.

(4) Conclusion

Based on the foregoing we conclude that plaintiff has failed to adduce sufficient evidence to establish

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[8] Plaintiff's Opposition (docket No. 38) ¶ 30. *See also,* Plaintiff's Sur-reply (docket No. 40) ¶ 23 (emphasis ours).

that she had an ADA covered disability which in turn triggered the protection afforded by the statute.

B. REGARDED AS DISABLED

Plaintiff further contends that defendant violated the ADA in that she was "perceived as" disabled by her employer.

In its definition of the term "disability" the ADA includes not only those individuals with impairments that substantially limit their major life activities, but also those persons who "are regarded as having such an impairment." 42 U.S.C § 12102(2).

According to the Supreme Court "[t]here are two apparent ways in which individuals may fall within this statutory definition: (1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities. In both cases, it is necessary that a covered entity entertain misperceptions about the individual – it must believe either that one has a substantially limiting impairment that one does not have or that one has a substantially limiting impairment when in fact, the impairment is not so limiting." *Sutton,* 527 U.S. at 489. *See also, Bailey,* 306 F.3d at 1169; *Carroll,* 294 F.3d at 238 n.4; *Rodriguez-Garcia v. Junta de Directores,* 415 F.Supp.[2d] 42, 45 (D.P.R. 2006). *See also, Katz v. City*

Metal Co., Inc., 87 F.3d 26 (1st Cir. 1996) (accommodation due under perception of disability claim under ADA).

The purpose behind this provision is to avoid situations where an individual is "rejected from a job because of the 'myths, fears and stereotypes' associated with disabilities". 29 C.F.R. § 1630.2(*l*) EEOC Interpretative Guidance citing *Sch. Bd. of Nassau County v. Arline*, 480 U.S. 273, 287, 107 S.Ct. 1123, 94 L.Ed.2d 307 (1987). *See also, Sutton*, 527 U.S. at 489-90; *Calef*, 322 F.3d at 87 n.9.

"An employer runs afoul of the ADA when it makes an employment decision based on a physical or mental impairment, real or imagined, that is regarded as substantially limiting a major life activity." *Sutton*, 527 U.S. at 490.

"'A plaintiff claiming that he is 'regarded' as disabled cannot merely show that his employer perceived him as *somehow* disabled; rather, he must prove that the employer regarded him as disabled within the meaning of the ADA." *Benoit*, 331 F.3d at 176 (*citing Bailey*, 306 F.3d at 1169) (emphasis in original); *Sullivan*, 358 F.3d at 117.

In this particular case, plaintiff contends that her employer mistakenly believed that her physical conditions substantially limited her ability to work.

That is, her employer perceived her as substantially limited in the major life activity of working.[9]

Hence, we must ascertain whether plaintiff's termination was prompted by Pfizer's inaccurate perception that she was disabled within the meaning of the ADA. "Since [claimant] contends that [her employer] perceived [her] to be substantially limited in the major life activity of working, [she] must show that [she] was perceived as being unable to work in either a class of jobs or a broad range of jobs in various classes as compared with the average person having comparable training, skills, and abilities." *Bailey,* 306 F.3d at 1169-70. Being unable to carry out a particular type of job does not qualify as a substantial limitation to the major life activity of working. *See also, Toyota,* 534 U.S. at 186; *Guzman-Rosario,* 397 F.3d at 11[;] *Sullivan,* 358 F.3d at 116; *Whitlock,* 345 F.3d at 46; *Benoit,* 331 F.3d at 176.

We find that, based on the record, plaintiff has proffered sufficient evidence to establish a prima facie case that Pfizer regarded her as having an ADA-covered impairment which prevented her from going back to work and which led to her eventual termination. According to the evidence presented, Pfizer mistakenly believed that plaintiff's impairment substantially limited her ability to work in the entire pharmaceutical industry. Dr. Felix, the plant's in-house physician, noted that "with these limitations

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[9] Plaintiff's Sur-reply (docket No. 40) ¶ 16.

[plaintiff] cannot stay in the plant."[10] Both in her deposition[11] as well as in her sworn statement,[12] plaintiff related that Frances Guzman, Pfizer's Assistant Personnel Manager, had informed plaintiff that with the restrictions recommended by her physician plaintiff had no chance of working either at Pfizer or at any other pharmaceutical company.

Because we are at a summary judgment stage we are not permitted to make credibility determinations. Hence, our ruling must be based on the evidence submitted by plaintiff regarding defendant's perception of her condition. Accordingly, we must deny the summary disposition of this particular claim at this time.

V. LAW 44

In addition, plaintiff seeks relief under Law 44, the local disability provisions. Defendant has sought to dismiss these state-based claims and plaintiff has failed to oppose the request. Inasmuch as Law 44 mirrors the ADA, because we have concluded that plaintiff is not disabled within the meaning of the ADA, except for the "regarded as" cause of action, her other Law 44 disability claims must also fail. *Garcia Diaz v. Darex,* 148 D.P.R. 364, 385 (1999); *Roman*

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[10] Plaintiff's Opposition (docket No. 38) Exh. VII.

[11] Plaintiff's Opposition (docket No. 38) Exh. II Tr. pp. 166-67.

[12] Plaintiff's Opposition (docket No. 38) Exh. III.

Martinez v. Delta Maintenance Serv. Inc., 229 F.Supp.2d 79, 86 (D.P.R. 2002).

VI. CONCLUSION

Based on the foregoing, defendant's Motion for Summary Judgment (docket No. **37**)[13] is **GRANTED** in part.

We find that plaintiff was not disabled within the meaning of the ADA. Accordingly, the ADA discrimination claims for failure to accommodate and termination due to her disability are hereby **DISMISSED**.

Accordingly, the Law 44 discrimination claims for failure to accommodate and termination due to her disability are hereby **DISMISSED**.

Judgment shall be entered accordingly.

The request to dismiss the ADA claim and Law 44 claim for termination due to plaintiff's perceived disability is **DENIED**.

Defendant's Motion to Strike (docket No. **41**) is **DENIED**.[14]

IT IS SO ORDERED.

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[13] *See,* Plaintiff's Opposition (docket No. **38**); Pfizer's Reply (docket No. **39**) and Plaintiff's Sur-reply (docket No. **40**).

[14] *See,* Motion Objecting the Filing of Motion to Strike (docket No. **42**).

San Juan, Puerto Rico, this 30th day of November, 2006.

S/ Raymond L. Acosta
RAYMOND L. ACOSTA
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

DELIA RUIZ RIVERA, Plaintiff, v. PFIZER PHARMACEUTICAL LLC, Defendant.	)	CIVIL NO. 01-1757 (RLA)

ORDER GRANTING DEFENDANT'S MOTION FOR RECONSIDERATION AND DISMISSING PLAINTIFF'S PERCEIVED DISABILITY CLAIMS

Defendant's Motion for Reconsideration (docket No. **67**) is **GRANTED**.

Accordingly, the claims for termination due to plaintiff's perceived disability under the Americans with Disabilities Act and Puerto Rico Law No. 44 of July 2, 1985, as amended, are hereby **DISMISSED** based on the arguments presented by defendant in its request for reconsideration.

Judgment shall be entered accordingly.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 8th day of January, 2007.

S/ Raymond L. Acosta
RAYMOND L. ACOSTA
United States District Judge

FILED
JUL 24 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-1598

In the Supreme Court of the United States

DELIA RUIZ RIVERA,

Petitioner,

v.

PFIZER PHARMACEUTICALS, LLC,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether there is a split among the circuits regarding the treatment to be afforded perceived disability claims under the ADA which are based on a plaintiff's exclusive reliance on the employer's recognition of work restrictions imposed by the employee's treating physician in the context of a request for reasonable accommodation.

II. Whether Petitioner has presented compelling reasons to grant the petition where the First Circuit Court of Appeals' decision in connection to plaintiff's pleading shortcomings on a perceived disability theory of liability is in line with the Supreme Court decisions in Sutton and Twombly and Rule 8 of the Federal Rules of Civil Procedure, and, moreover, was only an alternative, procedural basis for upholding the dismissal of plaintiff's ADA claim.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Pfizer Pharmaceuticals, LLC ("Pfizer") states as follows:

1. All interested parties to this proceeding are identified in the caption.

2. Pfizer is a Delaware corporation whose stock is wholly owned by Pfizer Inc, a publicly held corporation whose stock is traded in the NYSE.

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STATEMENT OF THE CASE

Ruiz began working for Pfizer in 1997, on a temporary basis, as a packaging operator at its Barceloneta, Puerto Rico, facility. Thereafter, towards the end of 1998, she became a regular employee and was assigned to the plant's bottling department. Her position required that she pour pills, bottles and caps, monitor the conveyor, pack and inspect the product, and clean the machinery. See Pet. App. at 2.

Beginning in August 1999, Ruiz took several consecutive medical leaves because of pregnancy-related conditions. She gave birth on December 31, 1999. See id. at 2-3. On February 25, 2000, upon the completion of her maternity leave, Ruiz submitted to Pfizer's in-house physician, Dr. Luis Félix, a medical certificate from her treating physician, Dr. Ramos, indicating she was being treated for carpal tunnel syndrome and lumbo sacral disc herniation. See id. at 3. Dr. Ramos indicated that Ruiz was fit to return to work, with specific limitations. He recommended that she avoid repetitive hand motions, placing her hands over her shoulders, lifting, pushing, holding and bending, and placed a twenty-five pound limitation on how much she could lift. See id. At the same time, Ruiz presented a medical certificate from a second physician, diagnosing her with major depression. Pfizer, accordingly, granted her an additional month of leave benefits. See id. at 3-4.

On March 27, 2000, Ruiz returned to work and insisted that Pfizer implement Dr. Ramos' earlier recommendations and work restrictions. See id. at 4. After consulting with the plant managers, Dr. Félix

informed her that there were no opportunities available at the plant where she could work with such stringent limitations. See id. He, nevertheless, agreed to confer with Dr. Ramos, and prepared for him a consultation form regarding Ruiz' condition, treatment options and rehabilitation opportunities. See id.

After an additional week of leave, Ruiz reported back and provided Dr. Félix with the consultation report which provided a diagnosis of left carpal tunnel syndrome, both wrists tendinitis and herniated discs. In addition, in order to prevent further deterioration of Ruiz' condition, Dr. Ramos restated the work restrictions listed in the February 24 medical certificate. Dr. Ramos further noted that the restrictions should last at least six months, "but may be longer." Id. at 4-5. Based on this information and the restrictions imposed by Dr. Ramos, Dr. Félix concluded that "in view of [these] recommendations and after conversations with [Ruiz'] work area supervisors where she cannot perform the essential tasks of her job and needs her hands I do not recommend a RTW [(return to work)] to prevent further aggravation or lesion. Case discussed [with] HR [(Human Resources)] for plan of action." Id. at 5.

Ruiz later spoke with Frances Guzmán, Pfizer's Assistant Personnel Manager, who advised her that Pfizer did not have to accommodate the restrictions imposed by her doctor because, in Guzmán's view, she was not disabled under the ADA. See id. As explained by Guzmán in her deposition:

> [B]ecause there is no permanent disability, and this is exactly how I explained it to her and is

> based on what her physician is saying. I do not have to make an accommodation under the ADA .... And then I explained that what her doctor is writing, in fact, she cannot perform the duties of a packaging operator . . . but that is not a qualified condition.

Id. at 5, n.1.

Ruiz asserts that Guzmán also told her that because of the conditions imposed by her physician, there was no opportunity for her to work at Pfizer or at any other pharmaceutical company. Guzmán recommended additional medical leave and that Ruiz seek non-occupational disability benefits. See id. at 6. Pfizer took no action to terminate Ruiz. See id.

Three months later, in a letter dated June 21, 2000, Pfizer requested that Ruiz return for a meeting to discuss her health and status. Ruiz responded by letter but did not accept Pfizer's request for a meeting. See id. On December 22, 2000, Pfizer sent a second letter requesting that plaintiff report to work on December 28, 2000. Ruiz did not appear for work nor did she excuse her absence. See id. at 31. Notwithstanding plaintiffs's failure to return to work, on January 16, 2001, Pfizer sent yet another letter requesting that Ruiz return to work by January 22, 2001, or she would be terminated. See id. at 32. Again, Ruiz did not call or return to work and her employment was, therefore, terminated. See id. at 6.

After exhausting administrative remedies, plaintiff filed a complaint in federal court. The Amended Complaint alleged numerous violations of federal and

Puerto Rico law, including the Americans with Disabilities Act ("ADA"). With respect to her claims under this statute, the Amended Complaint did not separate her failure to accommodate claim and her regarded as claim into distinct causes of action. There was no factual allegation that Ruiz had any non-limiting impairment which Pfizer wrongly regarded as limiting a major life activity—let alone a specific one—and nowhere averred that Pfizer had stereotyped her, mis-characterized or mis-perceived Ruiz' condition. The Amended Complaint's sole reference to perceived disability lay in paragraph 45, where it simply and conclusively stated that Pfizer had "intentionally discriminated against plaintiff because of her perceived disability." See Ct. Appeals' J.A. at 1-11.

On January 31, 2003, Pfizer filed a motion for summary judgment which essentially addressed plaintiff's contentions in connection to Pfizer's failure to provide a reasonable accommodation. See id. at 21-184. Ruiz opposed the motion and it is in the context of this opposition that Ruiz first spelled out her regarded as theory of liability—this, over Pfizer's strenuous but unsuccessful objections. See id. at 198-202.

On November 30, 2006, the United States District Court for the District of Puerto Rico issued an "Order in the Matter of Plaintiff's Disability Claim" and entered a partial judgment whereby it dismissed plaintiff's claims for failure to accommodate and termination due to disability, and denied it with respect to the plaintiff's claim for termination due to perceived disability. See Pet. App. at 26. With respect

to Ruiz' claim for disability discrimination, the District Court held that plaintiff had failed to establish she was disabled within the meaning of the ADA in order to trigger an obligation to provide reasonable accommodation. See id. at 47-48. As to plaintiff's claim for perceived disability, the District Court explained there were issues of fact regarding whether or not Pfizer perceived plaintiff as disabled and whether this mistaken belief had led to Ruiz' termination from employment. See id. at 50-51.

Pfizer filed a timely Motion for Reconsideration under the auspices of Rule 59(e) of the Federal Rules of Civil Procedure. See Ct. Appeals' J.A. at 376-86. In said motion, Pfizer requested that the District Court reconsider its decision regarding Ruiz' perceived disability claim inasmuch as the uncontested evidence on the record established there were non-discriminatory reasons for plaintiff's termination and that there was no evidence of pretext. See id. at 380-81. Pfizer further argued there was no evidence from which a reasonable fact-finder could conclude that Pfizer regarded Ruiz as disabled. See id. at 381-86. In this respect, Pfizer averred that plaintiff could not use statements made in connection to her request for reasonable accommodation in support of her claim for perceived disability. See id.

Plaintiff opposed this request, yet, on January 8, 2007, the Court granted Pfizer's motion and entered Judgment dismissing the remaining portions of plaintiff's case. See Pet. App. at 54. The dismissal was upheld on appeal before the First Circuit Court of Appeals. See id. at 25.

REASONS FOR DENYING THE PETITION

A. There is no Conflict Among the Circuits Regarding the Evidentiary Foundations of Perceived Disability Claims

Plaintiff's petition for certiorari review argues the First Circuit Court of Appeals' decision in the instant case "exacerbated" a conflict among the circuits. See Pet. Cert. at 8. According to Ruiz, "[t]here is a long standing conflict in the circuits regarding whether a plaintiff may rely on her employer's recognition of the restrictions imposed by her doctor to show the employer 'regarded' her as having a substantially limiting impairment under 42 U.S.C. § 12102(2)(C)." Id. at 9. More specifically, Ruiz points to the Third Circuit and Ninth Circuit decisions in Taylor v. Pathmark Stores, Inc., 177 F.3d 180 (3rd Cir. 1999), and Holihan v. Lucky Stores, Inc., 87 F.3d 362 (9th Cir. 1996), respectively, as conflicting with the Sixth, Eighth and Tenth Circuit decisions in Gruener v. Ohio Casualty Insurance, 510 F.3d 661 (6th Cir. 2008), Breitkreutz v. Cambrex Charles City, Inc., 450 F.3d 780 (8th Cir., 2006), and Lusk v. Ryder Integrated Logistics, 238 F.3d 1237 (10th Cir. 2001), which, according to plaintiff, the First Circuit now joined. A careful review of these five decisions reveals, however, that they are not in conflict.

The Third Circuit decision in Taylor was premised on the fact that the defendant in that case perceived the plaintiff as disabled "based on a *mistaken interpretation* of his medical records." 177 F.3d at 188 (emphasis added). In that case, notwithstanding the fact that plaintiff's treating physician had indicated

the restrictions were "temporary," the employer incorrectly interpreted them as being of a "permanent" nature. Id. The Court of Appeals, therefore, found that "a reasonable jury could conclude that Pathmark erroneously regarded him as disabled" and, therefore, reversed the grant of summary judgment with respect to the regarded as claim. Id. The Court explained that while "[a]n employer can rely on an employee's information about restrictions . . . it has to be right when it decides that those restrictions are permanent . . . ." Id. at 191-92.

The Court of Appeals' decision in the present case highlighted the fact that Ruiz "may not rely *exclusively* on her employer's recognition or implementation of the restrictions imposed by her own physician to establish a regarded as claim." Pet. App. at 20 (emphasis added). This simply does not conflict with the Third Circuit's decision in Taylor. As discussed above, the holding in Taylor was not based solely on the fact that the employer had relied on the medical information provided by plaintiff. Rather, it also considered the fact that the employer had *misinterpreted* this medical information. This stands in stark opposition to the facts of the instant case where, as noted by the First Circuit Court of Appeals,

> Ruiz . . . does not maintain that she *could* perform her job as packaging operator . . . . with the restrictions imposed by her doctor, but that Pfizer mistakenly believed her unable to do so; rather, she maintains that she could perform

> her job if granted the accommodations [to which she was not entitled].

Id. at 19.

Notably, the Taylor and Holihan decisions predate this Court's landmark decision in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999).[1] To this effect, we submit that any possible conflict suggested by these two decisions was resolved by the reasoning in Sutton. This reality is more evident in the Holihan case, where the Ninth Circuit based its decision on the sole fact that the employer had received medical reports containing a diagnosis of depression, see 87 F.3d at 366, without passing over the employer's perception of substantial limitation in the major life activity of working or whether it was with respect to a broad class of jobs, as required by Sutton. See 527 U.S. at 491.

Moreover, this Court should further note the existence of two additional decisions from the Ninth Circuit, issued after Holihan, which suggest a position in line with the one adopted by the First Circuit in the instant case. More specifically, in Thompson v. Holy Family Hospital, 121 F.3d 537, 541 (9th Cir., 1997), the Ninth Circuit relied on the Eighth Circuit decision in Wooten v. Farmland Foods, 58 F.3d 381, 386 (8th Cir. 1995), and held that "an employer's decision to terminate an employee 'based upon the physical

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[1] This Court's decision in Sutton was issued on June 22, 1999, whereas Taylor was decided on May 19, 1999, and Holihan on June 29, 1996.

restrictions imposed by her doctor . . . does not indicate that [the employer] regarded [her] as having a substantially limiting impairment.'" Thompson, 121 F.3d at 541 (quoting Wooten, 58 F.3d at 386). Additionally, in Thornton v. McClatchy Newspapers, Inc., the Ninth Circuit noted that "when an employer takes steps to accommodate an employee's restrictions, it is not thereby conceding that the employee is disabled under the ADA or that it regards the employee as disabled." 261 F.3d 789, 798 (9th Cir. 2001).

Contrary to Ruiz' contentions in her petition, the First Circuit Court of Appeals' decision turned on the fact that plaintiff's *only* evidence of discrimination on the basis of perceived disability lay in Pfizer's recognition and implementation of the restrictions imposed by her own treating physician. See Pet. App. at 20. There is nothing in the opinion which suggests that evidence of this kind must be ignored, or never considered, in evaluating the ultimate issue of discriminatory intent. What the decision does is recognize that plaintiff failed to bring forth sufficient evidence which could lead a reasonable factfinder to conclude that discrimination on the basis of perceived disability was the reason for her termination from employment. See id. at 21. Thus, the decision is one based on the tried-and-true principles of McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973), and its progeny, regarding a plaintiff's ultimate burden of proving intentional discrimination. See, e.g., Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981) ("The ultimate burden of persuading the trier of fact that the

defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."). As has been previously explained by this Court:

> [w]hether judgment as a matter of law is appropriate in any particular case will depend on a number of factors. Those include the strength of the plaintiff's prima facie, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law [or, as in this case, one for summary judgment].[2]

Reeves, 530 U.S. at 148-49.

This is also the recognition of the Sixth, Eighth and Tenth Circuit cases of Gruener, 510 F.3d at 665, Breitkreutz, 450 F.3d at 784, and Lusk 238 F.3d at 1241—cases where the plaintiffs' claim of perceived disability was, not only based on the employer's statements made in connection to restrictions imposed by the particular employees' treating physicians, or in the context of reasonable accommodation efforts, but, more importantly, based on evidence which, *on its own*, is generally insufficient to carry the plaintiff's ultimate burden of proof regarding the issue of intentional discrimination. Additional cases along this

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[2] "[T]he standard for granting summary judgment 'mirrors' the standard for judgment as a matter of law, such that 'the inquiry under each is the same.'" Reeves, 530 U.S. at 150 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-51 (1986)).

line include, Cannon from the Sixth Circuit, Wooten v. Farmland Foods, 58 F.3d 382, 386 (8th Cir. 1995) (affirming summary judgment where "the evidence bearing on [defendant's] perception of [plaintiff's] impairment indicates that its . . . was not based upon speculation, stereotype, or myth, but upon a doctor's written restriction on [plaintiff's] physical abilities."), and Nuzum v. Ozark Automotive Distributors, Inc., 432 F.3d 839, 848-49 (8th Cir. 2005) (rejecting notion that employer's failure to provide reasonable accommodation constituted established that employee was regarded as disabled), from the Eighth Circuit, and Rakity v. Dillon Companies, Inc., 302 F.3d 1152, 1162-63 (10th Cir. 2002) (explaining that employer's statements recognizing treating physician's restrictions do not imply employee is substantially limited in his major life activities), from the Tenth Circuit.

B. The First Circuit Court of Appeals' Decision to Affirm the Grant of Summary Judgment Was Appropriate in Light of the Uncontested Evidence on the Record

In Murphy v. United Parcel Service, Inc., the Supreme Court explained that an employee's showing that he "is regarded as unable to perform the job of mechanic only when that job requires driving a commercial motor vehicle" is "insufficient to create a genuine issue of material fact as to whether [he] is regarded [by his employer] as unable to perform a class of jobs utilizing his skills." 527 U.S. 516, 524 (1999). It further held that "the undisputed record evidence demonstrat[ed] that [the employee was], at most, regarded as unable to perform a particular job"

and that, therefore, summary judgment was appropriately granted. Id. at 525.

The facts of the instant case are similar in the sense that, based solely on the work restrictions imposed by Ruiz' treating physician, Pfizer deemed plaintiff unable to perform the essential functions of *her particular job*. See Pet. App. at 17-18. Importantly, the undisputed record shows that Pfizer did not consider Ruiz' impairment to constitute a covered disability and, moréover, it did not terminate Ruiz' employment when it refused her the accommodation she requested. See id. at 19. Ruiz' reference to Guzmán's statement—one removed from any termination decision, made in response to the specific restrictions recommended by Ruiz' doctor and in connection to the denial of her request for an accommodation—are insufficient as a matter of law to carry plaintiff's burden of proving she was terminated because she was incorrectly regarded as disabled under the ADA.

Simply put, Ruiz cannot use Pfizer's lawful refusal to provide her with an accommodation as the basis for her regarded as claim. To allow this, "would be tantamount to allowing [Ruiz'] dismissed failure to accommodate claim in through the back-door." Id. at 21. This play on the particular circumstances of the case does not save plaintiff's termination claim for perceived disability from summary dismissal. The Court of Appeals decision to uphold was, accordingly, correct and should not be disturbed.

C. The First Circuit Court of Appeals' Decision Regarding Pleading Requirements Is in Line with this Court's Decisions in Sutton and Twombly and Rule 8 of the Federal Rules of Civil Procedure

Plaintiff also petitions this Court for certiorari review based on the First Circuit's interpretation of this Court's decision in Sutton v. United Air Lines, Inc. "that regarded as claims under the ADA require an even greater level of specificity [in pleading] than other claims." Plaintiff, however, ignoring the holdings of this Court in Sutton and, more recently, in Bell Atlantic Corporation v. Twombly, __U.S.__, 127 S. Ct. 1955, 1964-66 (2007), as well as the black and white realities of her Complaint, suggests this is tantamount to imposing a heightened standard of pleading. We disagree.

In her petition, Ruiz states that the First Circuit Court of Appeals did not deny that the Complaint contained a number of specific allegations concerning Ms. Ruiz' interactions with Pfizer's officials in their response to her diagnoses and acknowledged that at paragraph 45 of her Complaint she alleged "Pfizer terminated plaintiff because of her perceived disability." See Pet. Cert. at 19; Pet. App. at 14. The Court of Appeals, however, also noted that plaintiff's pleading with respect to her regarded as claim was altogether indistinct—so much so, that Pfizer was unaware such a claim had been raised. As a matter of fact, the conclusion at paragraph 45 of the Complaint is the *only* allegation made in the Complaint in connection to Ruiz' claim for perceived disability. See Ct. Appeals' J.A. at 7. No allegation was made with respect to the major life activity as to which Pfizer

mistakenly perceived plaintiff to be substantially limited in. Since no major life activity was identified in this respect, the Complaint also failed to state the nature of this perceived limitation such that would meet the ADA's requirement that it be a *substantial* limitation. Moreover, since plaintiff did not specifically allege Pfizer's mistaken perception related to the major life activity of "working," she did not, and, in a sense, could not include the minimum allegation, required by Sutton, that Pfizer perceived her as being unable to work in a broad class of jobs. See Sutton, 527 U.S. at 491.

The Supreme Court's decision in Sutton, recognizing the particularities of a perceived disability claim in the face of an employer's prerogative "to prefer some physical attributes over others and to establish physical criteria," made clear that "[a]n employer runs afoul of the ADA when it makes an employment decision based on a physical or mental impairment, real or imagined, that is regarded as substantially limiting a major life activity." Id. at 490. Thus, an employer "is free to decide that some limiting, but not *substantially limiting*, impairments make individuals less than ideally suited for a job." Id. at 491. We submit, therefore, that this Court's decision in Sutton did not establish a heightened standard of pleading, but, rather, simply applied the standard of Rule 8 of the Federal Rules of Civil Procedure to ADA claims for perceived disability, affording due consideration to the particularities of such a claim when the allegation relates to the major life activity of working. As noted by the Supreme Court, the complaint's allegations in Sutton, when considered in tandem, simply did not state a claim upon which relief

could be granted because it nowhere stated that the employer regarded the Suttons' impairment as substantially limiting their ability to work. See id. Evidently, the employer perceived the plaintiffs' condition as precluding them from working in a particular job—that is why the job was not offered to them. The determinative factor, and what might render the employment decision discriminatory, is when the employer makes a decision based on its perception that the employee is *substantially limited from working in a broad class of jobs*. An allegation that does not take this distinction into account might be "short and plain," but will not "show," under Rule 8, that the pleader is entitled to relief under the ADA. See Fed. R. Civ. P. 8(a)(2).

This posture is further clarified in Twombly, where this Court explained that

> [w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact).

127 S.Ct. at 1265-66 (internal quotations omitted).

This is precisely the standard applied by the First Circuit Court of Appeals in the instant case. The

Court below did not require that Ruiz set out in detail the facts upon which she based her claim, but, rather, recognized[3] that the "mere inclusion of the word 'perceived' [in paragraph 45 of the Compliant] was not enough to put Pfizer on notice that Ruiz . . . was making a regarded as claim against it." Pet. Ap. at 16. The fact is that, under Rule 8(a)(2), Ruiz contentions in her complaint with respect to her perceived disability claim were so "short and plain" they simply did not "show" an entitlement to relief. The procedural record of the case speaks for itself and proves right the Court of Appeals' conclusion. This is, essentially, an issue of fair notice and, in this case, Ruiz' complaint simply did not put Pfizer on notice of her regarded as claim. The First Circuit Court of Appeals decision did not apply a heightened pleading standard, but, rather, decided the issue as one of fair notice, in accordance with the mandate of Rule 8 and this Court's decisions in Sutton and Twombly.

D. The Decision Below Does not Create a Conflict Among the Circuits Regarding the Pleading Requirements of Perceived Disability Claims Where the Perceived Limitation Relates to the Major Life Activity of Working.

In her petition, Ruiz suggests that the First Circuit's decision in the instant case creates a conflict with the decisions of the Sixth, Seventh and Ninth Circuits. We submit there is no such conflict. The

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[3] As discussed in part E, infra, this issue merely provided an alternative, procedural ground upon which the claim could have been subject to dismissal. See Pet. App. at 16.

three cases discussed by petitioner in her brief are clearly distinguishable from the facts of Sutton and the present case, which deal with an allegation of perceived disability from the major life activity of working.

The Sixth Circuit case of EEOC v. J.H. Routh Packing Co., was an enforcement action brought by the EEOC on behalf of the representative plaintiff and "all other similarly situated qualified individuals with disabilities." 246 F.3d 850, 851 (6th Cir. 2001). More importantly, it was not a perceived disability case. See id. At 852. Accordingly, the Sixth Circuit interpreted the application of Sutton only with respect to the pleading of corrective measures. See Id. at 854.

In Mattice v. Memorial Hospital, the Seventh Circuit Court of Appeals explained that, while the plaintiffs in Sutton alleged they were regarded as disabled from the major life activity of working, the plaintiff in Mattice claimed he was regarded as disabled from the major life activity of "cognitive thinking." 249 F.3d 682, 685 (9th Cir. 2007). The Seventh Circuit interpreted the Supreme Court's emphasis on the fact that the plaintiffs in Sutton had not argued that they were perceived as being disabled from the major life activity of seeing[4] to, instead, argue perceived disability from the major life activity of working, as demonstrative of the fact that Sutton's requirement of a specific allegation regarding the inability to work in a "broad class of jobs" was limited

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[4] An argument the Supreme Court characterized as the "obvious argument." Sutton, 527 U.S. at 490.

to cases dealing with this particular major life activity. See id. The case before us, however, is one that *does* deal with an allegation (albeit one that was not raised until the summary judgment stage) regarding perceived disability from the major life activity of working. The facts of Ruiz' case are, therefore, distinguishable from Mattice, and fall squarely within the holding of Sutton.

Finally, Skaff v. Meridien North America Beverly Hills LLC, presented a claim for injunctive relief under Title III of the ADA (the statute's public accommodations provision), as opposed to Title I (the statute's employment provision) implicated in the instant case. 506 F.3d 832, 836 (9th Cir. 20017). Moreover, the case did not deal with the issues of perceived disability or the major life activity of working. Again, the issue is distinguishable from Sutton and the facts of Ruiz' case, and does not conflict with the Court of Appeals' decision below.

E. Alternatively, the First Circuit Court of Appeals' Decision Regarding Plaintiff's Pleading Shortcomings Merely Provided an Alternative, Procedural, Basis to Uphold the Dismissal

It is important to note that, in the instant case, the insufficiency of plaintiff's pleading provided only an alternative, procedural ground for the summary dismissal of the regarded as claim. Different from Sutton, Twombly, J.H. Routh, and Mattice, cases which suffered dismissal on the pleadings for failure to state a claim, Ruiz' claim was dismissed on summary judgment for failing to bring forth sufficient evidence from which a reasonable jury could conclude

intentional discrimination on the basis of perceived disability. The procedural issue in Skaff, is also distinguishable, inasmuch as it dealt with the plaintiff's entitlement to an award of attorney's fees after a settlement agreement. The present case, therefore, provides a poor vehicle for addressing any confusion that might exist among the circuits in connection to the pleading requirements set forth in Sutton. The Court of Appeals decision in this case, should, therefore, not be disturbed.

CONCLUSION

Petitioner in the instant case has not established compelling reasons for this Honorable Court to exercise discretionary jurisdiction over Ruiz' dismissed Complaint. Indeed, Ruiz' claims were appropriately addressed by the District Court and the First Circuit Court of Appeals below, and should not be disturbed by this Honorable Court. Petitioner's petition for writ of certiorari should, accordingly, be denied.

This 24th day of July, 2008.

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In The

Supreme Court of the United States

DELIA RUIZ-RIVERA,

Petitioner,

v.

PFIZER PHARMACEUTICALS LLC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

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REPLY TO BRIEF IN OPPOSITION

A. This Court Should Review the First Circuit's *Per Se* Rule Barring "Regarded As" Claims Where the Employer's Perception of Disability is Based on a Treating Physician's Report

The summary judgment record, taken in the light most favorable to Ms. Ruiz, shows that Pfizer's company doctor regarded her impairment as at least disqualifying her from any job in her plant, and that Pfizer's Assistant Personnel Manager regarded that impairment as disqualifying her from any job in the entire pharmaceutical industry. Pet. App. 30-31. Under this Court's jurisprudence, that evidence is sufficient to create a triable issue that the company "regarded" Ms. Ruiz as substantially limited in the major life activity of working. See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 491-493 (1999). But the court of appeals held, as a matter of law, that the perceptions of Pfizer's company doctor and Assistant Personnel Manager could not establish a perceived disability under the Americans with Disabilities Act (ADA), because those perceptions were based on the restrictions Ms. Ruiz's own physician imposed. Pet. App. 20-21. As we showed in our petition – and the company makes no real effort to dispute – that holding is flatly inconsistent with the statutory text. See Pet. 13-18. That text reaches any case in which an individual is "regarded" by her employer "as having [a substantially limiting] impairment." 42 U.S.C.

§ 12102(2)(C). Nothing in the text excludes cases in which the employer's perception is based on the reports of its employee's treating physician. By reading an unexpressed exception into the "regarded as" provision's unqualified text – and requiring plaintiffs to come forward with a particular type of evidence that the statute does not, on its face, require – the court of appeals contravened this Court's precedents. See *Desert Palace v. Costa*, 539 U.S. 90, 98-99 (2003); *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 211-212 (1998).

More important for present purposes, the court of appeals' decision exacerbated a conflict in the circuits. As we showed in our petition (at 11-13) the First Circuit's holding follows cases from the Sixth, Eighth, and Tenth Circuits. But its ruling conflicts with the decisions of two circuits that have upheld "regarded as" claims where the employer's perception of the plaintiff's disability rested on reports of the plaintiff's own physician: the Third Circuit's decision in *Taylor v. Pathmark Stores, Inc.*, 177 F.3d 180 (3d Cir. 1999) – which specifically rejected the rule the First Circuit adopted here, see *id.* at 190-191 – and the Ninth Circuit's decision in *Holihan v. Lucky Stores, Inc.*, 87 F.3d 362 (9th Cir. 1996), cert. denied, 520 U.S. 1162 (1997). Although Pfizer attempts to deny the conflict, the company's arguments are unavailing.

As to Judge Becker's decision for the Third Circuit in *Taylor*, the company attempts to distinguish the case on its facts. The company contends that *Taylor* "was premised on the fact that the

defendant in that case perceived the plaintiff as disabled 'based on a *mistaken interpretation* of his medical records.'" Br. in Opp. 6 (quoting *Taylor*, 177 F.3d at 188) (emphasis in Br. in Opp.). But that does not distinguish the cases. Pathmark, the employer in *Taylor*, made the same sort of mistake Pfizer made here. Pathmark erroneously concluded based on Taylor's physician's report "that [Taylor] was unable to perform *any* Pathmark job." *Taylor*, 177 F.3d 188. Similarly, Pfizer's company doctor interpreted Ms. Ruiz's physician's restrictions as disqualifying Ms. Ruiz from all jobs in the plant, and the company's Assistant Personnel Manager interpreted those restrictions as disqualifying her from all jobs in the industry. The *entire basis* of Ms. Ruiz's claim of discrimination is that those interpretations were mistaken – that she was in fact "a *qualified* individual with a disability who was *able to perform* the essential functions of her position." Amd. Cplt. ¶ 49 (emphasis added). Because the lower courts granted summary judgment to Pfizer on the ground that Ms. Ruiz did not have a disability, she never had the opportunity to prove that the company's perception was mistaken.[1]

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[1] Pfizer suggests (at 8) that *Taylor* is irrelevant because it was decided before this Court's decision in *Sutton*, *supra*. As we showed in the petition (at 16-17), *Sutton* said absolutely *nothing* about the evidence on which a plaintiff can rely to establish that her employer "regarded" her as having a disability. In any event, the Third Circuit has continued to rely on *Taylor*'s "regarded as" holding since *Sutton*. See *Williams v. Philadelphia Housing*

(Continued on following page)

Pfizer does not deny a conflict with the Ninth Circuit's decision in *Holihan*. Instead, the company argues that subsequent Ninth Circuit decisions are in accord with the First Circuit's decision here.[2] See Br. in Opp. 8-9 (citing *Thompson v. Holy Family Hosp.*, 121 F.3d 537 (9th Cir. 1997), and *Thornton v. McClatchy Newspapers, Inc.*, 261 F.3d 789 (9th Cir. 2001)). But those decisions do *not* support the First Circuit's holding barring *as a matter of law* those "regarded as" claims that are based on an employer's recognition of restrictions imposed by the plaintiff's treating physician. Rather, they stand only for the proposition that an employer's recognition of those restrictions will not *always* establish that the employer regarded the employee as having a *substantially limiting* impairment. In *Thornton*, 261 F.3d at 798, the court found "no specific evidence that McClatchy viewed [the plaintiff] as substantially limited" and held that the mere fact that McClatchy took steps to accommodate the plaintiff did not establish that it regarded her as having an ADA-covered

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Auth. Police Dept., 380 F.3d 751, 769-770 (3d Cir. 2004), cert. denied, 544 U.S. 961 (2005).

[2] The company also suggests (at 8) that *Holihan*'s interpretation of "substantially limits" is inconsistent with *Sutton*'s interpretation of that term. Whether or not that is true, nothing in *Sutton* undermines *Holihan*'s reliance on employer perceptions that are based on the reports of the plaintiff's treating professionals. See Pet. 16-17. In any event, the Ninth Circuit has continued to rely on *Holihan*'s "regarded as" holding since *Sutton*. See *Deppe v. United Airlines*, 217 F.3d 1262, 1266 & n.14 (9th Cir. 2000).

disability. In *Thompson*, 121 F.3d 541, the court found that "[t]he evidence does not establish that the hospital viewed Thompson as precluded from performing a broad class of jobs." The court noted that the defendant hospital made the plaintiff "aware of another job opportunity at the hospital," and that the defendant thought she could perform "several possible jobs in the nursing industry." *Id.* Here, unlike in *Thornton* and *Thompson*, the statements of Pfizer's company doctor and Assistant Personnel Manager constitute specific evidence that the company viewed Ms. Ruiz as substantially limited – and, indeed, unable to work in the plant or the industry.

As a last resort, Pfizer asserts that the court of appeals did not refuse to consider evidence of the company's recognition of the restrictions imposed by Ms. Ruiz's treating physician. The court's decision, the company suggests, rests on a fact-based assessment that Ms. Ruiz simply did not present sufficient evidence. Br. in Opp. 9-10. But that suggestion flies in the face of the First Circuit's decision. In opposing summary judgment, Ms. Ruiz relied on two pieces of evidence to show that the company perceived her as substantially limited in the major life activity of working: the company doctor's statement that she could not work anywhere in the plant, and the Assistant Personnel Manager's statement "that, because of the conditions imposed by her physicians, there was no opportunity for her to work at Pfizer or at any other pharmaceutical company." Pet. App. 6, 30. As a purely factual matter, these statements certainly

tend to show that Pfizer perceived Ms. Ruiz as substantially limited in working under the test set forth in *Sutton*, 527 U.S. at 491-493.[3] But the court of appeals specifically refused to assess the *factual* inferences that might be drawn from those statements. Instead it held that, as a matter of law, they could not be used to support a "regarded as" claim. See Pet. App. 20 ("Ruiz Rivera may not rely exclusively on her employer's recognition or implementation of the restrictions imposed by her own physician to establish a regarded as claim."); *id.* at 21 ("Any reliance on Dr. Felix's statements or opinion, based entirely on Ruiz Rivera's own doctor's recommendations, cannot support a regarded as claim."). That holding exacerbates a conflict in the circuits and is entirely unwarranted by the ADA's text. This Court's intervention is necessary to resolve the conflict and vindicate the supremacy of the statutory language Congress adopted.

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[3] Contrary to the company's suggestion (at 12), Ms. Ruiz is not attempting to "use Pfizer's lawful refusal to provide her with an accommodation as the basis for her regarded as claim." Ms. Ruiz's claim rests not on the denial of accommodation but on the *express statements* of Pfizer officials regarding the limiting effects of her impairment. To the extent that Pfizer is arguing that a contrary inference can be drawn from those statements, that is a matter for the trier of fact. Because Ms. Ruiz was the nonmoving party, all reasonable inferences from the summary judgment record must be drawn in her favor.

B. This Court Should Review the First Circuit's Heightened Pleading Standard for "Regarded As" Claims

As we showed in our petition (at 18-22), the court of appeals held that this Court's decisions in *Sutton*, *supra*, and *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), dictated that "regarded as" claims "require an even greater level of specificity [in pleading] than other claims." Pet. App. 16. To plead such a claim, the court held, "a plaintiff must select and identify [in the complaint] the major life activity that she will attempt to prove the employer regarded as being substantially limited by her impairment." *Id.* Although Ms. Ruiz's complaint included a number of specific allegations concerning the company's perception of her impairment – including a specific reference to the company doctor's statement regarding *his* perception of its limiting effects, see Pet. 5 (citing the complaint)[4] – the court of appeals found her pleading insufficient because she failed to satisfy its heightened pleading standard. As we showed (at 20-21), that holding implicates significant confusion in the lower courts regarding the effect of this Court's decision in *Twombly*. It also conflicts with the Sixth

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[4] Pfizer asserts that the allegation that it "terminated plaintiff because of her perceived disability," Amd. Cplt. ¶ 45, "is the *only* allegation made in the Complaint in connection to Ruiz's claim for perceived disability." Br. in Opp. 13. As the portions of the complaint quoted at page 5 of our petition show, that is not so.

Circuit's decision in *EEOC v. J.H. Routh Packing Co.*, 246 F.3d 850, 854 (6th Cir. 2001), which held that "the substantially limited major life activity need not be specifically identified in the pleadings." It conflicts as well with the Seventh Circuit's decision in *Mattice v. Memorial Hosp.*, 249 F.3d 682, 685 n.3 (7th Cir. 2001), which rejected the notion that *Sutton* "creat[ed] a heightened pleading standard." And it conflicts with the Ninth Circuit's decision in *Skaff v. Meridien North America Beverly Hills LLC*, 506 F.3d 832, 841-842 (9th Cir. 2007), which specifically rejected the notion that *Twombly* requires or permits courts to impose a heightened pleading standard in ADA cases.

Pfizer responds to these cases with a series of spurious distinctions. The company notes (at 17) that *J.H. Routh* was filed by the EEOC on behalf of an individual employee rather than by the individual employee himself – a fact that makes no difference whatsoever to the relevant legal standard. The company also asserts that *J.H. Routh* "was not a perceived disability case." *Id.* But that is simply false. The EEOC asserted present- *and* perceived-disability claims before the Sixth Circuit, see Final Br. for the EEOC, *EEOC v. J.H. Routh Packing Co.*, 2000 WL 35466788 at *24-*25 (2000), and that court's holding that "the substantially limited major life activity need not be specifically identified in the pleading," *J.H. Routh*, 246 F.3d at 854, does not limit itself to present-disability claims. The company argues (at 17-18)

that *Mattice* did not involve the major life activity of working. But that case in fact specifically addressed the question whether *Sutton* "require[d] that a plaintiff allege the inability to work in a broad class of jobs" and answered that question in the negative, though it cautioned that "under *Sutton*, a plaintiff can plead himself out of court by alleging as his disability the inability to work in a *limited* class of jobs." *Mattice*, 249 F.3d at 685 n.3 (emphasis added). And the company notes (at 18) that *Skaff* involved Title III (the public accommodations title) rather than Title I (the employment title) of the ADA. But that is irrelevant. *Skaff*'s holding that *Twombly* does *not* demand a heightened pleading standard in ADA cases, 506 F.3d at 841-842, conflicts with the First Circuit's holding here that *Twombly does* demand such a standard.

Pfizer finally suggests (at 18-19) that this case is not an apt "vehicle" to address the conflict over pleading standards under the ADA, because the First Circuit's adoption of a heightened pleading standard was merely an "alternative" holding. That suggestion might make a difference if the First Circuit's *other* "alternative" holding were defensible. But, as we have shown, it is not. Indeed, it independently warrants a grant of certiorari. Because each of the First Circuit's two "alternative" holdings conflicts with the decisions

of other circuits and of this Court, this Court should grant certiorari to address both of them.[5]

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[5] If the Court believes that the reliance-on-treating-physician question warrants certiorari but the heightened-pleading question does not, it would be appropriate for the Court to grant certiorari limited to the first question presented in the petition. There is reason to doubt whether the First Circuit's resolution of the pleading question was truly independent of its resolution of the treating-physician question. For example, the court's pleading analysis cited only a single allegation in the complaint regarding Pfizer's perception of Ms. Ruiz's impairment. Pet. App. 15-16. The court rather puzzlingly failed to acknowledge the allegation in the complaint that set forth the company doctor's statement of his perception of the limiting effect of that impairment. Amd. Cplt. ¶ 36. That omission might be explained by the court's conclusion that the company doctor's perception was based on Ms. Ruiz's physician's report and thus was irrelevant on the merits. In such circumstances, the Court could appropriately grant certiorari on the first question presented and then, after its ruling on the merits, remand for further consideration of the pleading question in light of that ruling and Fed. R. Civ. P. 15. See *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 458 (2006) (*per curiam*) ("The Court of Appeals should determine in the first instance whether the two aspects of its decision here determined to have been mistaken were essential to its holding."); *Bradshaw v. Stumpf*, 545 U.S. 175, 187-188 (2005) (addressing one issue raised by court of appeals' opinion and remanding to give court of appeals opportunity to consider how this Court's disposition implicated another possibly related question).

CONCLUSION

For the foregoing reasons and the reasons set forth in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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